United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT AND JOINT APPENDIX

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,650

LOCAL 130, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, APPELLANT,

v.

FRANK W. McCULLOCH, ET AL, Members of the National Labor Relations Board, APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF THE QUESTIONS PRESENTED

1. Whether the District Court had jurisdiction over a complaint for an injunction to set aside a decision, order, and direction of election of the National Labor Relations Board in a representation proceeding which alleged that the Board had exceeded its statutory authority and denied the plaintiff due process of law.

2. Whether the Board amended a certification of representatives so as to redetermine an appropriate unit for purposes of collective bargaining pursuant to Section 9 of the National Labor Relations Act and exclude employees formerly included therein without a hearing and thus exceeded its statutory authority and denied due process to the certified representative.

3. Whether the Board directed an election pursuant to an employer's petition filed under Section 9 of the National Labor Relations Act in the absence of a claim by any union to be the exclusive representative of the employees in the unit claimed to be appropriate and thus exceeded its statutory authority.

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IN THE

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No. 18,650

LOCAL 130, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, APPELLANT,

v.

FRANK MCCULLOCH, HOWARD JENKINS, BOYD LEEDOM, JOHN H. FANNING AND GERALD A. BROWN, Individually and as Members of the National Labor Relations Board, APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This case comes before this Court on appeal from an order dismissing Appellant's complaint for an injunction (J.A. 1, 41). Appellant sought thereby to review and set aside a decision, order, and direction of election of the National Labor Relations Board, hereinafter referred to as the Board, amending a certification of representatives held by Appellant on the ground that the Board violated the Fifth Amendment to the United States Constitution and

Section 9 (c)(1) of the National Labor Relations Act, as amended, hereafter referred to as the Act (June 23, 1947, c. 120, Title I, § 101, 61 Stat. 143, 29 U.S.C. § 159, as amended October 22, 1951, c. 534, § 1, 65 Stat. 601). As alleged in the complaint the District Court had jurisdiction under 62 Stat. 93, 28 U.S.C. § 1337 and Act of June 11, 1946 c. 324, § 10, 60 Stat. 243, 5 U.S.C. § 1009 (J.A. 1). On February 26, 1964, the District Court entered findings of fact, conclusions and an order granting the Board's motion to dismiss the complaint (J.A. 33-41). Appellant filed notice of appeal on April 24, 1964, (J.A. 41). This Court has jurisdiction of the appeal under Act of June 25, 1948, c. 646, 62 Stat 929, 28 U.S.C. § 1291.

STATEMENT OF THE CASE

This case is before the Court on appeal from an Order granting Appellees' motion to dismiss the complaint. Accordingly, the material facts must be taken as alleged in the complaint and the exhibits attached thereto.

Appellant, hereinafter referred to as IUE, is a voluntary labor organization which has represented approximately 1500 production and maintenance employees of the Electronics Division of Westinghouse Electric Corporation located at Friendship International Airport, Baltimore, Maryland, for a number of years. Local 1805, International Brotherhood of Electrical Workers, hereinafter referred to as IBEW, is likewise a voluntary labor organization which has represented approximately 2200 production and maintenance employees at the Air Arm Division of Westinghouse, which is located adjacent to the Electronics Division at Friendship Airport, (J.A. 2, 12, 33-34).

Prior to July, 1962, each Division operated separate maintenance departments in their respective buildings. There were approximately 39 maintenance employees in the

Air Arm Division and 26 in the Electronics Division. Both groups were called upon to perform maintenance work as required in a Central Services building, which handled administrative work for both divisions (J.A. 12, 34). In the summer of 1961, Westinghouse commenced construction of a new Maintenance Shop, contemplating the movement of both maintenance departments into a common department for both Divisions. Following the completion of the new building, in July 1962, the company transferred some maintenance employees and equipment from both the IBEW and IUE units to the maintenance shop (J.A. 12-13, 34).

Following the transfer, IBEW filed a grievance and initially claimed the right to represent the maintenance employees in the Electronics Division, who were transferred to the new maintenance shop *as part of its existing unit.* Subsequently, on September 13, 1962, IBEW struck in support of that claim, and, as a result, Westinghouse charged IBEW with violations of Section 8(b)(4) and (7) of the Act.[1] The Board petitioned the United States District Court for the District of Maryland to enjoin the violation of the Act, which it found probable cause to believe had occurred. In its complaint, the Board sought to enjoin the strike on the ground that Westinghouse was lawfully recognizing IUE as the bargaining agent for certain maintenance employees in the Electronics Division, that a collective bargaining agreement was in effect which covered those employees and therefore, "a question con-

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[1] 29 U.S.C. § 158(b)(4) and (7). The portions of the Act involved make it an unfair labor practice for a labor organization to strike to force or require an employer to recognize a particular labor organization as the representative of his employees if another organization has been certified as their representative under Section 9 or if the employer has lawfully recognized another labor organization and a question concerning representation cannot be raised under Section 9, Sections 8(b)(4)(C) and 8(b)(7)(A).

cerning representation could not appropriately be raised concerning these employees." (J.A. 2-3, 13-14, 34-35). Upon the agreement of IBEW not to strike and of the Company to seek clarification of the units by the Board, the District Court on October 4, 1962, determined to hold in abeyance the Board's injunction request while efforts could be made to resolve the dispute which gave rise to the picketing (J.A. 3, 13, 35). IUE was not a party to this District Court proceeding.

Thereafter, on October 5, 1962, IUE filed charges with the AFL-CIO charging that IBEW's efforts to gain recognition for maintenance employees transferred to the Maintenance Shop from the Electronics Division as part of IBEW's existing unit violated the no-raiding provisions of the AFL-CIO Constitution (J.A. 14, 35).

On October 9, 1962, Westinghouse filed with the Board its Motion for Clarification of Bargaining Units in Cases Nos. 5-RC-2929 and 5-RC-2143, in which it requested as relief "*That the Board direct a hearing* to fully explore the nature of this dispute," and to determine which certification, if any, was applicable to its plan to integrate into one new unit some maintenance employees from each of the existing units represented by IUE and IBEW respectively (emphasis added), (J.A. 3, 14, 35). IBEW initially, on October 17, 1963, while the raiding charges were pending, filed a response to the Employer's Motion, requesting that the Motion be granted and contending, as it had since July that all the maintenance employees transferred to the new building were an accretion to its production and maintenance unit (J.A. 14, 35).

Before any further proceedings occurred before the Board, the Impartial Umpire under the AFL-CIO internal disputes procedure issued an award in favor of IUE, finding that IBEW's claim to represent all employees in the maintenance shop as an accretion to its unit constituted

raiding against IUE's established bargaining relationship with respect to the unit of production and maintenance employees in the Electronics Division. As a result, on January 29, 1963, IBEW withdrew its response to the Employer's Motion for Clarification, and on February 12, 1963, IBEW reiterated that it withdrew any prior claim to represent any employees in the Electronics Division (J.A. 3, 14, 35-36). On February 13, 1963, the Regional Director withdrew the outstanding unfair labor practice complaint on the basis of which he had instituted the Maryland District Court proceeding (J.A. 3, 13-14).

Only thereafter, on February 14, 1963, was the Employer's petition in Case No. 5-RM-471 filed, requesting an election be held in a unit of all hourly paid maintenance employees, including laborers and storeroom attendants, assigned to or working out of the new maintenance shops. No individual or labor organization at that time or thereafter claimed to be the exclusive representative of the employees set forth in that unit. (J.A. 3, 14, 35-36).

Notwithstanding the absence of any claim by any individual or labor organization to be the exclusive representative of the unit set forth in the petition, as the Board in its later decision conceded was the case,[2] the Board gave notice of and conducted a hearing on May 7, 1963, confined to the petition in Case No. 5-RM-471 (J.A. 4, 11, 36). At the hearing, both unions again disclaimed all interest in the unit described in the petition and opposed the petition on the ground that no individual or labor organization claimed to be the exclusive representative in the unit set forth in the petition, as well as the added ground that the petition was premature under the Board's

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[2] The Board found only that "Local 1805 at one time claimed to represent all the maintenance employees" (J.A. 15).

contract bar rules. After stating their positions, they withdrew from the hearing (J.A. 5, 36).

No notice of hearing was ever given and no hearing was ever held with respect to the Motion for Clarification is Cases Nos. 5-RC-2929 and 5-RC-2143 (J.A. 4, 11, 36). Nonetheless, on September 9, 1963, the Board issued its "Decision and Direction of Election and Order Partially Granting Motion for Clarification," in which for the first time, after the hearing in Case No. 5-RM-471, the cases were consolidated for decision. In its Decision, the Board revised both existing production and maintenance units to exclude all maintenance employees from both units, created a new unit of maintenance employees, and directed an election in that unit, notwithstanding the absence of any claim of representation for such unit (J.A. 5, 11, 16, 36-37).

On September 25, 1963, both unions filed a Joint Motion for Reconsideration in which they urged reconsideration of the Board's decision, pointing out that no hearing had been held on the Motion for Clarification. On October 29, 1963, the request for reconsideration was denied (J.A. 5, 19-21, 38-39). The complaint in this case was filed before the election was held pursuant to the Board's Direction (J.A. 6, 39).

The complaint alleged that the Board's action in amending the unit represented by plaintiff without a hearing on Westinghouse's Motion for Clarification violated a mandatory requirement of the Act and denied IUE due process of law (J.A. 6). It alleged also that the Board's action in directing a hearing and an election on the Employer's representation petition in the absence of a claim by any union to be recognized as the exclusive representative in the unit claimed to be appropriate also violated a statutory requirement (J.A. 4). The complaint alleged that unless these acts were restrained, IUE would suffer grave and irreparable injury by reason of the impairment

of its status as bargaining representative and its contractual rights, that its administrative remedies were exhausted, and that it has no adequate remedy at law or indeed no other means for relief except through this proceeding (J.A. 6-7).

In granting the Board's motion to dismiss, the District Court made findings essentially in accord with the allegations of the complaint and the exhibits attached thereto.[3] The Court concluded that nothing precludes the Board from conducting an election on an employer's petition where a union has made a claim to be recognized and subsequently withdraws that claim. Finding that to be the case here, the Court concluded that the Board's direction of an election was within its discretion (J.A. 39-40). The Court also rejected the claim that the Board violated the Act and denied Appellant due process by failing to hold a hearing on the motion to clarify the existing certifications, concluding that the issues raised by the employer's petition were essentially the same as those raised by the motion to clarify, "i.e. the effect of the actual and projected changes in the Company's operations on the existing collective bargaining units." (J.A. 40). The Court thereupon concluded that the Court lacked jurisdiction over the subject matter of the action and ordered the complaint dismissed. (J.A. 40-41).

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[3] The finding in paragraph 3 (J.A. 34) that employees in each department were assigned exclusively to maintenance work located within their respective divisions is contrary to the finding of the Board in its decision (J.A. 12). The last sentence in paragraph 4 seems unsupported (J.A. 34). In any event these findings along with those in paragraph 11 (J.A. 36) are immaterial to the issues before the Court. The findings in paragraph 15 (J.A. 39) are not based on the complaint or exhibits attached to it. However, none of these findings appear to have been relied upon by the District Court.

STATUTE INVOLVED

The statute involved is the National Labor Relations Act, as amended, § 9, Act of June 23, 1947, c. 120, Title I, § 101, 61 Stat. 143; as amended Oct. 22, 1951, c. 534 § 1, 65 Stat. 601. The relevant parts of the statute are:

> Sec. 9(a) "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *.
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> "(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—
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> "(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a) of this section; or
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> "(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a) of this section;
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> the Board shall investigate such petition and if it has reasonable cause to believe that a question of represen-

tation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing tha such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

"(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c).

* * * * * * *

"(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board."

STATEMENT OF POINTS

1. The District Court had jurisdiction to entertain Appellant's complaint seeking to set aside actions of the National Labor Relations Board alleged to be unconstitutional and unauthorized by the National Labor Relations Act.

2. The action of the National Labor Relations Board in amending the certification of Appellant without a hearing was in violation of constitutional rights of the Appellant and unauthorized by the National Labor Relations Act.

3. The action of the National Labor Relations Board in directing an election pursuant to an employer's petition

in the absence of any claim by a labor organization or individual that it was the exclusive representative of the employees in the unit set forth in the petition, was also unauthorized by the National Labor Relations Act.

4. The complaint stated a claim on which relief could be granted, and should not have been dismissed.

SUMMARY OF ARGUMENT

I. This action challenges two actions of the Board, and the District Court had jurisdiction over both. The first is the Board's action amending the existing units without any hearing with respect thereto. The second is the direction of an election pursuant to the Westinghouse petition in the absence of any claim by any labor organization to represent the employees in the unit set forth in the petition.

The Court's jurisdiction stems from *Fay* v. *Douds*, 172 F. 2d 720 (C.A. 2) and *Leedom* v. *Kyne*, 358 U.S. 184. They hold that the District Courts have jurisdiction to enjoin representation proceedings where the complaint contains an "assertion of a constitutional right [which] is not transparently frivolous" or asserts "an attempted exercise of power that had been specifically withheld." 172 F. 2d at 723, 358 U.S., at 189. As this Court's decision in *Miami Pressmen's Local 46* v. *McCulloch*, 116 U.S. App. D.C. 243, 322 F. 2d 993, establishes, with respect to the latter, the governing principle is not a verbalistic formula which may be mechanically applied, but whether or not the complaint states a claim that the Board has plainly exceeded its authority.

Here the complaint claims a denial of a hearing in violation of the plaintiff's rights to due process over which the District Court had jurisdiction and indeed which gave it jurisdiction over the entire complaint. *Fay* v. *Douds*, *supra*. Further, it aserts that the denial of a hearing was

in violation of a plain statutory requirement that a hearing be held. Finally, it asserts that the Board entertained an employer's representation petition in the absence of a claim by any labor organization to be the exclusive representative of the employees in the unit set forth in the petition as appropriate, despite the plainly manifested intent of Congress to prohibit it from doing so. These assertions conferred jurisdiction on the District Court.

II. Plaintiff had a Constitutional right to a hearing on the Employer's Motion for Clarification at least before entry of a final order depriving it of its representation rights *Inland Empire District Council* v. *Millis*, 325 U.S. 697; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hall*, 281 U.S. 673. It may not be necessary to decide the constitutional question, however, because in the absence of specific authorization from Congress, it should not be inferred that the Board has the power to deprive a union of its representation rights without a hearing. *Greene* v. *McElroy*, 350 U.S. 474. Not only is such authorization lacking, but the Act discloses that Congress required that a hearing be held in every case unless waived.

The District Court rejected Appellant's contention in this regard on the grounds that the issue in the hearing on the employer's petition was essentially the same as the issue raised by the Motion for Clarification, and that having held a hearing on the petition, the Board was not required to hold a second hearing because the unions declined to participate in the first hearing.

In finding that the issues raised by the petition and the motion were the same, the District Court was in error. The unions' withdrawal from the first and only hearing is irrelevant, for even if they had participated fully in it, a second hearing would have been required because of the different issue raised by the motion. The petition did not raise an issue as to the effect of changes in the employer's

operations on the existing bargaining units. That issue was raised by the Motion for Clarification. The unit issue raised by the petition was whether the unit set forth in the petition was an appropriate unit. In identifying the issues in the two proceedings, the District Court failed to recognize that a finding that the unit set forth in the petition was an appropriate unit did not preclude a finding that the existing units were also appropriate. *Morand Brothers Beverage Co.*, 91 NLRB 409.

Moreover, it was not the unions who caused the issues to be heard separately. They were separately raised, and because the Board failed to consolidate them for purposes of hearing, there was every reason to believe they were to be separately resolved. Even if the two proceedings could have been consolidated for hearing, having chosen to proceed as it did, the Board is bound by the course it chose. *Vitarelli* v. *Seaton*, 359 U.S. 535.

The Board's Decision confirms the correctness of the belief that the issues were different. Had the issues truly been the same, there would have been no need to consolidate the two proceedings after the hearing or to act on the motion to clarify, for the petition should have been an adequate basis for disposing of the litigated issues. The fact that it was not demonstrates the separation of the issues in the two proceedings.

III A. Section 9(c) of the Act does not give the Board authority to direct elections whenever it chooses. Among the limitations on its authority to conduct elections are those set forth in Section 9(c)(1)(B) relating to petitions filed by employers. They authorize employer petitions alleging that one or more unions have presented a claim to be recognized as the exclusive representative of all the employees in an appropriate unit. The Board has consistently interpreted the Act to require proof that such a claim has been made as a jurisdictional fact. *Herman Lowen-*

stein, Inc., 75 NLRB 377. This requirement manifests Congress' intent that the provision for employer petitions shall not provide a means by which an employer could gain an election at a time when a union did not claim representation or was not ready.

The discretion of the Board to decide issues relating to the existence of a question concerning representation or appropriate unit is not unbounded. Where there are specific statutory standards, the Board has no discretion to ignore them. Congress having placed a specific limitation in the statute to prevent the direction of an election in the absence of a claim by a union to be the exclusive representative in the unit claimed to be appropriate, the Board has no discretion to ignore it.

B. In directing an election pursuant to the employer's petition, the Board ignored the statutory limitation on its authority. Instead it advanced a number of reasons all of which are invalid. It sought to justify its action as resolving a dispute which other efforts had failed to resolve. But the Board has no at large authority to resolve knotty disputes. It gained no added authority from the fact that a Maryland District Court withheld action in connection with a different unfair labor practice proceeding, which had since been resolved, in the hope that the Board might resolve that dispute. Nor did the fact that IBEW had once claimed all the maintenance employees aid the Board, for by its very statement the Board conceded that at the time the petition was filed and at all times thereafter, there was no such claim in existence. The fact that the two unions' non-overlapping claims encompassed all the maintenance employees as portions of their respective production and maintenance units did not establish that any union claimed to be the exclusive representative of a unit of all the maintenance employees. Finally, the fact that maintenance employees might be left without representation is none of

the Board's concern if no union sought to represent them. None of the reasons advanced by the Board established the existence of the Board's authority. The Board's action was not a permissible exercise of discretion within its authority, but was in excess of its authority contrary to the statute and the clear intent of Congress.

Thus, as an independent matter or in conjunction with the denial of a hearing on the Motion for Clarification, the complaint stated a claim on which relief can be granted and over which the District Court had jurisdiction.

ARGUMENT

I. The District Court Had Jurisdiction Over the Subject Matter of This Action

There are two basic actions of the Board challenged in this proceeding, and the District Court had jurisdiction over both. The first is the Board's action amending the existing units without any hearing with respect thereto. The second is the direction of an election pursuant to the Westinghouse petition in the absence of any claim by any labor organization to represent the employees in the unit set forth in the petition. IUE contends that amendment of the units without a hearing violated its constitutional rights and exceeded the Board's statutory authority. IUE contends that the direction of election was also beyond the Board's authority.

The standards for the exercise of jurisdiction by the District Court in this action find their sources in *Fay* v. *Douds*, 172 F. 2d 720 (C.A. 2) and *Leedom* v. *Kyne*, 358 U.S. 184, which hold that the Federal District Courts have jurisdiction to enjoin representation proceedings before the National Labor Relations Board where there has been action by the Board which either denies a constitutional right or is in excess of the authority delegated to the Board

by the National Labor Relations Act. In this proceeding both grounds for jurisdiction are present.

In *Fay* v. *Douds, supra,* it was asserted that constitutional rights had been infringed by denial of a hearing. The Court held:

> "If this assertion of constitutional right is not transparently frivolous, it gave the Court jurisdiction; and having once acquired jurisdiction, the Court might, and should, dispose of all other questions which arose, even though they would not have been independently justiciable." (172 F. 2d, at 723).

In *Leedom* v. *Kyne, supra,* the action was brought to set aside a Board decision finding appropriate a unit which included both professional and non-professional employees without first permitting the professional employees an opportunity to vote on inclusion in such unit. It was alleged that this action was in excess of the statutory authority of the Board because §9(b)(1) of the Act, 29 U.S.C. §159 (b)(1), provided that the Board shall not include professional employees in the same unit as non-professional employees unless a majority of the professional employees vote for inclusion in such a unit. The Supreme Court agreed that the District Court had jurisdiction. It noted that the action was not one to "review" the decision of the Board in the sense of the term as used in the Act, but rather that it was "one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act." The Court held:

> "Plainly, this was an attempted exercise of power that had been specifically withheld. It deprived the professional employees of a 'right' assured to them by Congress. Surely in these circumstances, a Federal Dis-

trict Court has jurisdiction of an original suit to prevent deprivation of a right so given." (358 U.S., at 189).

In *McCulloch* v. *Sociedad Nacional de Marieros*, 372 U.S. 10, a very different question arose. There the Board had directed an election among the crews of ships flying foreign flags. The shipowners and a foreign union brought suit to enjoin the elections. The Supreme Court concluded that Congress did not intend to include foreign ships within the coverage of the Act, and that the Board did not have authority or power to conduct the representation elections it had directed.

The Court upheld the jurisdiction of the District Court as within "the limited exception fashioned in *Leedom* v. *Kyne*" even though "no specific prohibition in the Act was violated," because the question of the Board's power to act raised issues of importance requiring prompt judicial resolution. The Court noted that the exception was not to be taken as "an enlargement of the exception in *Kyne*."

Far from indicating that *Leedom* v. *Kyne* was intended to be limited to the case in which the prohibition was as specific as that which appeared on the facts there presented, *McCulloch* v. *Sociedad* confirms that it is not an enlargement of *Leedom* v. *Kyne* to assert jurisdiction to set aside a representation decision where the Board "plainly" attempted to exercise "power that had been specifically withheld."[4]

Indeed, this Court in *Miami Pressmen's Local 46* v. *McCulloch*, 116 U.S. App. D.C. 243, 322 F. 2d 993, has recognized that *Leedom* v. *Kyne* is not restricted to cases where

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[4] In *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 84 S.Ct. 894, the Supreme Court reaffirmed without change its *Kyne and Sociedad* decisions. It held that the issue there sought to be reviewed was essentially a factual determination which was not judicially reviewable.

the Board has acted contrary to a specific prohibition of the Act. There, the Court found that the Board's failure to take action made mandatory by the Act also gives rise to jurisdiction. But even more significant, it recognized that the presence of mandatory language is not the critical test, but that it is the manifiestation of the plain intent of Congress which must ultimately govern the jurisdiction of the court. For in the *Pressmen's* case, the Board failed to certify the results of an election despite the provision of Section 9(c)(1), 29 U.S.C. §159(c)(1), that it shall do so. The plaintiff sought to have the court compel the Board to certify the results. While asserting its jurisdiction to compel the Board to certify the results, the Court recognized that despite its mandatory language, "Clearly, 9(c)(1) is not mandatory in all instances"; and that the Board may refuse to certify results of an election which for some reason it finds should be set aside. 322 F. 2d, at 997.

Thus, the governing principle is not a verbalistic formula which can be mechanically applied to the words of the Act, but whether or not the Board has plainly exceeded its authority.

Here, the basis of jurisdiction is plain.

First, there is an assertion of constitutional rights which is not transparently frivolous which gives the Court jurisdiction over all questions which arise. *Fay* v. *Douds, supra; Miami Pressmen's Local 46* v. *McCulloch, supra.*

Second, if the Court does not wish to reach the constitutional question, the complaint further asserts that the Act makes a hearing mandatory and by amending the previously certified units without a hearing, the Board acted in excess of its authority and contrary to a specific mandatory provision of the Act, creating a separate basis for the assertion of jurisdiction over all the questions which arise. *Leedom* v. *Kyne, supra; Miami Pressmen's Local 46* v. *McCulloch, supra.*

Finally, it is asserted that the authority of the Board to direct an election pursuant to an employer petition under Section 9(c)(1)(B), 29 U.S.C. § 159(c)(1)(B), is predicated upon the allegation, and necesarily upon the proof, that "one or more individuals or labor organizations have presented to [the employer] a claim to be recognized as the representative defined in Section 9(a)" 29 U.S.C. § 159(a), which defines a representative as one "designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes," who is the exclusive representative "of all employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." It is asserted that the direction of an election absent such a claim is plainly in excess of the jurisdiction of the Board as intended by Congress, independently giving the Board jurisdiction over the questions raised herein. *Leedom* v. *Kyne, supra; Miami Pressmen's Local 46* v. *McCulloch, supra.*

The jurisdiction of the Court depends upon the claims asserted and not their ultimate merit. *Fay* v. *Douds, supra; Miami Pressmen's Local 46* v. *McCulloch, supra.* Here the claims asserted confer jurisdiction on the Court.

II. The Board's Action Amending the Certifications of Both Unions Violated Their Constitutional Rights and Was Unauthorized by the Statute.

Plaintiff's right to a hearing before the Board acted on the Company's Motion for Clarification is clear. Under the Constitution, plaintiff was entitled to a hearing at least before entry of a final order depriving it of its representational rights. *Inland Empire District Council* v. *Millis,* 325 U.S. 697; *Ohio Bell Telephone Co.* v. *Public Utilities Commission,* 301 U.S. 292; *Interstate Commerce*

Commission v. *Louisville National Railroad*, 227 U.S. 88, 93; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hall*, 281 U.S. 673, 678; *Morgan* v. *United States*, 304 U.S. 1, 18; *Opp Cotton Mills* v. *Administrator*, 312 U.S. 126, 152, 153; *Greene* v. *McElroy*, 360 U.S. 474, 496. Due process required that plaintiff be given "an opportunity to be heard and to defend its substantive right." *Brinkerhoff-Faris Trust & Savings Co., supra.*

As in *Greene* v. *McElroy, supra*, it may not be necessary to decide the constitutional question, for in the absence of explicit authorization from Congress, it should not be inferred that the Board has the power to deprive plaintiff of its rights without a hearing. Far from a grant of authority to act without a hearing, the Act discloses a clear Congressional intent that a hearing be held in every case unless waived. Thus, in Section 9(c)(1), the Board is commanded to provide an appropriate hearing whenever it has reasonable cause to believe a question concerning representation exists, and in Section 9(c)(2) the Board is commanded to apply the same regulations and rules of decision "irrespective of . . . the kind of relief sought."[5] 9(c)(4) underscores the intent to require hearings except where the parties waive a hearing by stipulation. Even when it carved out a limited exception in Section 8(b)(7) of the Act, 29 U.S.C. §158(b)(7),[6] to the otherwise uniform requirement that the hearing precede any election, Congress

[5] While the right to a hearing asserted herein relates to a motion for clarification of prior certifications rather than a hearing on a petition looking toward initial certification, no Congressional intent to require a hearing only in the latter case can be inferred, particularly in the light of Section 9(c)(2). Assuming that the Board's authority to amend certifications may be implied by Section 9, one cannot infer that Congress intended to give the Board greater freedom from procedural restraints in altering units than in establishing them initially.

[6] Section 8(b)(7) provides when a petition is filed in the face of organizational picketing the Board shall forthwith direct an election without regard to the provisions of Section 9(c)(1).

did not dispense entirely with the right to a hearing. *Department Store Employees Union* v. *Brown,* 284 F. 2d 619 (C.A. 9). See particularly 284 F. 2d at 627, n. 12. Accordingly, it is plain that Congress intended the Board to have no authority to enter a final order adjudicating substantive rights in a representation case without a hearing, and indeed made the hearing mandatory.

The District Court concluded that the Appellant's contentions in this regard were without substance. It held:

> "Plaintiff concedes that a hearing was held on the Company's petition for a representation election, and that the Board subsequently consolidated the petition and the motion for purposes of decision. The issues in the two proceedings were essentially the same, i.e. the effect of the actual and proposed changes in the Company's operations on the existing collective bargaining units. Having held one hearing to take evidence on this issue, the Board was not obliged to hold another merely because the unions had declined to participate in the first hearing." (J.A. 40).

The finding that the issues in the two proceedings were "essentially" the same not only is in error, but itself concedes that the issues were in some respects different. The union's withdrawal from the hearing on the employer's petition is completely irrelevant, for even had they participated in full at that hearing, the differences in the issues raised by the two proceedings warranted either a single consolidated hearing on both, which the Board in its wisdom chose not to order, or separate hearings on each.

The issue raised by the employer's petition was not the effect of changes in Company operations on the existing bargaining units. That issue was raised by the employer's Motion for Clarification. The issues raised by the em-

ployer's petition were whether there was any claim of representation to warrant an election, whether the union's contract barred an election, and if a question concerning representation otherwise appeared to exist, whether the unit set forth in the petition was *an* appropriate unit for purposes of collective bargaining.

The fallacy of the Court's statement of the issue raised by the petition lies in its failure to recognize that under well established Board precedent, a finding that the unit set forth in the petition was an appropriate unit did not preclude a finding that the existing units also continued to be appropriate, and that representation along existing unit lines could also continue. *Morand Brothers Beverage Co.*, 91 NLRB 409, 417-418; *Hot Shoppes, Inc.*, 130 NLRB 138, 141; *Housatonic Public Service Company*, 111 NLRB 877. Thus, assertion of the continuing appropriateness of the existing units was not inconsistent with the assertion that the unit set forth in the petition was also an appropriate unit, and the issues raised in the two proceedings were not the same or mutually inclusive.

Moreover, it was not the unions who caused these issues to be raised separately. The employer who filed the petition, also chose to raise the issues as to the existing units separately. When the hearing on the petition was directed, because the Board did not consolidate the two proceedings for hearings, there was every reason to believe that the issues were to be separately resolved. Even assuming that the two matters might have been consolidated for a single hearing, they were not. Having chosen to proceed in one manner, the Board cannot now complain that it could have proceeded differently and excuse itself thereby from the obligation to adhere to the procedures it chose to follow by failing to consolidate the petition and Motion for Clarification for purposes of hearing. *Vitarelli* v. *Seaton*,

359 U.S. 535; *Service* v. *Dulles*, 354 U.S. 363; *Accardi* v. *Shaughnessy*, 347 U.S. 260.

Thus, when the unions appeared at the hearing in 5-RM-471, they were entitled to rely on their right to a separate hearing on the Motion for Clarification and the understanding that only the issues raised by 5-RM-471 were to be decided on the basis of that hearing Even had they participated fully in that hearing, no hearing would have been held as to the issues raised by the motion to clarify. For the unions' risk in limiting their participation was only as broad as the issues on which the hearing was held. At most the Unions risked a finding that the unit set forth in the petition was *an* appropriate unit.

The Board's efforts to consolidate the two proceedings retroactively cannot conceal the fact that no hearing was ever held or ordered with respect to the amendment of the units in Cases Nos. 5-RC-2929 and 5-RC-2143.

The Board's decision confirms the correctness of the belief of both unions that it would be sufficient to establish in the appropriate proceeding that the existing units were appropriate in order for each to preserve its existing unit, for the Board found it necessary to act on the Motion for Clarification and amend the existing units before directing an election in the unit set forth in the employer's petition.[7] Had the unions been given the opportunity to present evidence on that issue and had they succeeded in establishing the continued appropriateness of the existing units, there would have been no occasion for the Board even to have considered directing an election in the unit set forth in the petition, in the absence of a claim for that unit, and the petition would properly have been dismissed without deciding the appropriateness of that unit. See *Southern*

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[7] If the issues in both proceedings were the same, there would have been no need to consolidate them or to act on the motion for clarification.

Greyhound Lines, 141 NLRB 753. Indeed, the Board's decision in that case demonstrates the hearing on the employer petition was not the proper forum in which to determine the appropriateness of the existing units in which no election was sought. 141 NLRB, at 756, n. 5.

Appellant is not aggrieved because it declined to participate in the hearing on the Employer's petition. It is aggrieved because after a hearing was held, the Board decided to change the ground rules under which the hearing was held and make it do for issues which were the subject matter of a separate proceeding. See *Worthington Pump Corp.* v. *Douds*, 97 F. Supp. 656.

Thus, with respect to this issue, there is clear basis for the Court to assert jurisdiction and the complaint states a claim on which relief should be granted.

III. The Board Had No Authority To Direct an Election Pursuant to the Company's Petition

A. The statute does not authorize the Board to entertain an employer petition absent a claim by an individual or labor organization that it is the exclusive representative of the employees in the unit set forth in the petition.

The District Court concluded that the Board's decision to direct an election among the employees of the maintenance shop in the new building was not in excess of the Board's authority but was within the scope of its expertise and discretion. This conclusion ignores the statute, ignores the Board's own consistent construction of its statutory authority, and obliterates the distinction between what the Board has discretion to decide and what it is precluded from deciding.

The statute does not grant the Board free rein to direct elections whenever it chooses. Section 9(c) of the Act, provides that the Board may direct an election only under certain circumstances. A petition must be filed; the

petition must be investigated; if the Board has reasonable cause to believe that a question of representation affecting commerce exists, a hearing must be provided; and if upon the record of the hearing the Board finds that such a question concerning representation exists, it must direct an election and certify the results thereof. The Board has no authority to direct elections outside of that granted it under Section 9(c).

Section 9(c)(1)(B), is the only source of authority for the Board to direct an election pursuant to a petition filed by an employer. That section provides that the machinery which may result in the direction of an election can be placed in motion only upon the filing of a petition by an employer "alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in Section 9(a)". A claim to be recognized as the representative defined in Section 9(a) means a claim "to be the exclusive representative of all the employees in an appropriate unit."

Unless Congress can be deemed to have intended merely that a petition filed by an employer contain an allegation in order to set the machinery in motion without regard to whether or not a hearing subsequently discloses the allegation to be supported by fact, it must follow that the statute requires that one of the elements which must be proved at any hearing pursuant to an employer petition is that the allegation required by Section 9(c)(1)(B) is, indeed, supported by fact. That is, that the employer has been presented a claim by one or more individuals or labor organization to be recognized as the exclusive representative of all employees in such unit.

The Board has consistently interpreted the Act to require not only proof that the allegation is made in the petition, but proof that the allegation is supported by fact.

Herman Loewenstein, Inc., 75 NLRB 377, at 382; *Darling & Co.*, 116 NLRB 374 at 376.

The reason for the incorporation in the statute of the requirement that an employer petition be supported by such proof is not difficult to ascertain. Provision for employer petitions was added by the 1947 amendments to the Act. Its purpose was to provide a means by which an employer might petition for an election to determine whether or not the union represented a majority in a unit it claimed in the event the employer was confronted with a claim of majority representation by a union which did not itself file a petition. It was not intended, however, to provide a means by which an employer could gain an election at a time when a union did not claim representation or was unprepared to go to an election. See House Report No. 245 on H.R. 3020, 80th Cong., 1st Sess., p. 35; Senate Report No. 105 on S. 1126, 80th Cong. 1st Sess., pp. 10-11, I Leg. Hist. of the Labor-Management Relations Act, 1947, pp. 326, 416-417. It can be readily seen that unless Section 9(c)(1)(B) is construed, as its language indeed requires, to mean that an employer must be presented with a claim for recognition as the exclusive representative in the unit in which the election is sought, the Congressional intent could be easily circumvented. For, assuming that a union presented a claim to be recognized as exclusive representative for a unit of an employer's maintenance employees, the employer could easily circumvent the requirements of the Act by filing a petition for an election in a unit of its production and maintenance employees on the basis that the union had made a claim to be exclusive representative of employees in a smaller unit. A union could thus be forced to an election in a unit it did not seek and at a time when it did not claim a majority in that unit. Thus, it is clear that Congress intended that a prerequisite

to the validity of a petition is a claim for recognition in the unit for which the employer has petitioned for an election.

The Board may have discretion to decide issues relating to the existence of a question concerning representation or the appropriateness of a unit in the absence of specific statutory standards. But in neither area is the Board's discretion entirely unfettered. In determining the appropriate unit, where there is a specific statutory standard, such as in the proviso to Section 9(b), 29 U.S.C. § 159(b), the Board may well run afoul of the Act by failing to follow the standard, and it has no discretion to ignore it. Compare *Leedom* v. *Kyne, supra* with *Consolidated Edison Co.* v. *McLeod*, 202 F. Supp. 351 (S.D. N.Y.) aff'd. 302 F. 2d 354 and *Int'l Union of Operating Engineers Local No. 148* v. *Int'l Union of Operating Engineers Local No. 2*, 173 F. 2d 557, 559 (C.A. 8). The restrictions on the Board's discretion are aptly described by the Fourth Circuit in *NLRB* v. *National Plastic Products Co.*, 175 F. 2d 755, at 758. There the Court stated, "Insofar as the certification involves the exercise of discretion, that is a matter with which we are powerless to interfere *so long as the Board acts within the limits of the law.*"

The Board's discretion to find that a question concerning representation exists pursuant to an employer petition is similarly restricted. The Board's discretion to find the existence of such a question is broad so long as it acts within the areas as to which the statute prescribes no specific standards, such as the Board's contract bar policies. But Congress expressly placed in the law a specific limitation to prevent the Board from directing an election upon an employer's petition in the absence of a claim by an individual or a labor organization for recognition as exclusive representative in the unit sought. The Board has no dis-

cretion to ignore that limitation. As the Board stated in *Herman Loewenstein, Inc., supra,* 75 NLRB, at 382, "Absent such a claim, the Board would be without jurisdiction to proceed with its investigation under Section 9(c)(1)(B) of the Act as amended."

In conditioning the grant of power to the Board to entertain employer petitions upon the existence of such a claim, Congress "[p]lainly. . .specifically withheld" the power to do so in its absence, *Leedom* v. *Kyne, supra,* 358 U.S., at 189.

B. The Board's direction of an election was in excess of its statutory authority

In its decision which Appellant here seeks to vacate, the Board studiously avoided this limitation, ignoring also its own prior decisions. Instead, the Board advanced a number of reasons to support its unauthorized direction of an election, none of which can validly supply the missing element required by Section 9(c)(1)(B), to confer authority on the Board to act (J.A. 15).

1. The first reason stated by the Board was that the efforts of the parties to resolve their dispute met with failure. This reason is totally irrelevant to the Board's jurisdiction to entertain an employer petition. Section 9(c)(1), does not provide for election proceedings for the purpose of arbitrating industrial disputes, and nowhere is the Board granted license to engage in such arbitration. Moreover, the initial dispute arose when the Employer desired to continue recognizing both unions and IBEW claimed to represent all maintenance employees. IBEW subsequently withdrew its earlier claim and agreed with IUE and the employer that two separate units should be maintained, whereupon the Employer immediately filed the petition. Thus, the efforts of IUE and IBEW had resolved

the dispute before the petition was filed. In any event, the grievance and arbitration procedure under the contracts was an adequate means for resolving any dispute which might thereafter arise, particularly in view of the absence of conflicting claims between the unions. See *Carey* v. *Westinghouse*, 375 U.S. 261.

2. The Board relied on the fact that the Employer and the Maryland District Court were "looking to the Board to resolve the dispute." This reason is likewise irrelevant to whether or not either union claimed to be exclusive representative of a unit consisting of the employees in the maintenance shop. Moreover, the Board totally ignored the fact that the dispute which was before the District Court had been resolved upon the withdrawal by the IBEW of its claim to represent any maintenance employees in the IUE unit. Following the withdrawal of that claim, the dispute no longer existed which gave rise to the Employer's charges and the issuance of the complaint from which the jurisdiction of the Maryland District Court arose. Indeed, the complaint was withdrawn by the Board's Regional Director, who recognized that the dispute was resolved, prior to the filing of the Employer's petition (J.A. 3). No dispute remained thereafter which the District Court could have "looked to the Board to resolve."

3. The Board stated that IBEW "at one time claimed to represent all the maintenance employees". But thereby the Board tacitly conceded what the facts indeed necessarily disclosed, that at the time the employer petition was filed and at all times thereafter, IBEW did not claim to represent all the maintenance employees. The Board has consistently refused to direct an election where the union made an unequivocal disclaimer of interest, even where such dis-

claimer was made at the hearing. See *Miratti's Inc.*, 132 NLRB 699, 701; *Andes Candies, Inc.*, 133 NLRB 758; *Southern Greyhound Lines*, 141 NLRB 753; *Amperex Electronics Corp.*, 109 NLRB 353; *Librascope, Inc.*, 91 NLRB 178; *Luper Transportation Co.*, 92 NLRB 1178; *Ny-Lint Tool and Mfg. Co.*, 77 NLRB 642. There the disclaimer followed the filing of the petition. Here the disclaimer was well in advance of the petition, and there was no basis to have entertained it in the first place If the Board were permitted to resurrect stale, withdrawn prepetition claims to support employer petitions, then the specific intention of Congress to prevent an employer from obtaining an election when the union did not claim representation and was unprepared would be thwarted For once a union had made such a claim, an employer petition could thereafter be filed at any time The IUE had never claimed to represent all the maintenance employees. It therefore followed that at no time material to the petition was there any claim by any labor organization to represent all the maintenance employees on which the employer's petition could be predicated.

4. The Board also relied on the fact that the present claims of both unions encompassed all maintenance employees. But this fact proves nothing. The jurisdictional prerequisite to an employer petition is not whether several labor organizations together make complementary claims of representation which encompass all employees set forth in the unit, but whether any labor organization claims to be the exclusive representative of the employees in the unit set forth in the petition.

Here neither Union claimed to be the exclusive representative of all the maintenance employees in the unit set forth in the petition. Each claimed rather to be the

exclusive representative of the employees in a unit consisting of all production and maintenance employees which it had historically represented. Indeed, the only claim to majority representation was that each Union represented a majority in its respective historical unit. Neither claim necessarily carried with it a claim of actual designation by any of the maintenance employees, since the production employees in each unit far outnumbered the maintenance employees here involved, and each union's majority in its production and maintenance unit could have been easily achieved without designation of the unions by any of the maintenance employees here involved. Thus neither Union claimed to be the exclusive representative of a unit consisting of all the maintenance employees, and the fact that the non-overlapping claims of the two unions to their historical units embraced the maintenance employees is irrelevant to the jurisdictional requirement of Section 9(c)(1)(B). See *Southern Greyhound Lines,* 141 NLRB 753; *Maclobe Lumber Co.,* 120 NLRB 320; *Housatonic Public Service Co.,* 111 NLRB 877.

5. The Board finally relied on the fact that dismissal of the petition would leave the employees without representation or the opportunity to select representation. However, again, the statute does not charge the Board with responsibility to see that employees are represented. If neither union sought to represent these employees, the Board would clearly have no right to insist that they seek to do so. Moreover, the fact that neither union may have sought to represent these employees in this unit did not mean that they had no opportunity to select representation by another union in this unit.

The Board's decision in this regard is completely inconsistent. On the one hand, it expressed concern that the employees would be left without representation or oppor-

tunity to select representation as a reason to grant the petition. On the other hand, it provided that both unions could withdraw from the ballot, thus leaving the employees without representation or an opportunity to select representation. But this rationalization would not have been available to the Board or needed by it, had it not in the same decision improperly wiped out the existing units, as we have shown above, and wrongfully created the irrelevancy on which it relied.

The above five reasons were the only grounds advanced by the Board for finding it had authority to entertain the employer's petition. None of these reasons establishes that the statutory prerequisite was present and therefore, none of these reasons is sufficient to support the Board's action. Under all the circumstances, it is plain that the Board in directing the election exercised the power which Congress specifically intended to withhold from it. Its decision was not merely a questionable exercise of its rightful discretion finding that the statutorily required claim existed but an attempt to exercise authority which it lacked in the admitted absence of such a claim.

The Plaintiff contends that pursuant to the decisions cited at pp. 14-16, *supra*, this Court has independent basis to assert jurisdiction to set aside the Board's unauthorized direction of the election. But whether the Court's jurisdiction to set aside the Board's direction of election arises independently or derives from the clear jurisdiction of the Court over the amendment of the units without a hearing, the allegations of the complaint with respect to the direction of election are sufficient to establish that the Board's decision was beyond its discretion and to state a claim for which relief can be granted.

CONCLUSION

For the reasons set forth above, the Order of the District Court dismissing the complaint should be set aside and the case remanded to the District Court for further proceedings.

Respectfully submitted,

BENJAMIN C. SIGAL,
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WINN I. NEWMAN,
1126 16th Street, N.W.,
Washington, D. C. 20036,
Attorneys for Plaintiff.

August 14, 1964.

INDEX TO JOINT APPENDIX

Relevant Docket Entries

Date	Entry
1963	
Dec. 17	Complaint, appearance, Exhibits 1, 2, and 3. filed.
Dec. 19	Motion of defendants to dismiss; P and A; c/s Dec. 19, 1963; Appearance of Arnold Ordman and Stephen B. Goldberg; m/c Dec. 19, 1963. filed.
1964	
Jan. 23	Memorandum of defendants in support of motion to dismiss; c/m Jan. 23, 1964; Exhibits 1-5. filed.
Feb. 6	Motions to dismiss complaint and for preliminary injunction argued and taken under advisement. Sirica, J.
Feb. 26	Findings of fact, conclusions of law and order denying plaintiffs application for preliminary injunction and granting defendants motion to dismiss complaint. (N) Sirica, J.
Apr. 24	Notice of appeal by plaintiff from order of Feb. 27, 1964; Copy mailed to Arnold Ordman, Labor Relations Board. Deposit $5.00 by Sigal. filed.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3018-'63

LOCAL 130, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, 2703 Wilkens Avenue, Baltimore 23, Maryland, *Plaintiff*,

v.

FRANK W. McCULLOCH, HOWARD JENKINS, BOYD LEEDOM, JOHN H. FANNING and GERALD A. BROWN, Individually and As Members of the NATIONAL LABOR RELATIONS BOARD, Washington, D. C., 1717 Pennsylvania Avenue, N.W., Washington, D. C., *Defendants*.

COMPLAINT FOR INJUNCTION

1. This action arises under the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. Section 151 et seq., an Act of Congress regulating commerce. This Court has jurisdiction under 62 Stat. 931, 28 U.S.C. Section 1337. This action also arises under Section 10(a), 10(b), 10(c) and 10(e) of the Administrative Procedure Act of 1946, 5 U.S.C. Section 101 et seq.

2. Plaintiff is a voluntary labor organization. It is chartered as a local of the International Union of Electrical, Radio and Machine Workers, AFL-CIO to represent employees of Westinghouse Electric Corporation in Baltimore, Maryland, and to promote their interests through collective bargaining and other mutual aid and protection. Its office is located at 2703 Wilkens Avenue, Baltimore 23, Maryland.

3. Defendant McCulloch is the Chairman of the National Labor Relations Board, and defendants Jenkins, Leedom, Fanning and Brown are members of that Board, and have acted in such capacities at all times material herein. The headquarters of the defendants is located at 1717 Pennsylvania Avenue, Washington, D. C.

4. Plaintiff was certified on October 28, 1958, by the National Labor Relations Board as the exclusive collective bargaining representative of all production and maintenance employees in the Electronics Division of Westinghouse Electric Corporation, Friendship International Airport, Baltimore, Maryland, hereinafter called Westinghouse.

5. Since said certification, and up to date, a collective bargaining agreement has been in effect between Westinghouse and Plaintiff covering the employees for whom Plaintiff has been the certified and recognized bargaining representative. The current agreement, expiring October 15, 1966, is a renewal and modification of a prior agreement in effect between Octobr 21, 1960, and October 15, 1963.

6. Local 1805, International Brotherhood of Electrical Workers, AFL-CIO, hereinafter called Local 1805, is a voluntary labor organization. Pursuant to certifications issued by the National Labor Relations Board on March 9, 1955, and August 17, 1960, Local 1805 served as the collective bargaining representative of Westinghouse production and maintenance employees at its Air Arm Division, Baltimore, Maryland.

7. Prior to September 23, 1962, Local 1805 contended that certain maintenance employees represented by the Plaintiff should be made part of the unit represented by Local 1805. On September 23, 1962, after refusal of Westinghouse to accept that contention, Local 1805 called a strike. Westinghouse filed unfair labor practice charges against Local 1805 on the ground that Westinghouse was lawfully recognizing Plaintiff for those employees, and that a question of representation could not appropriately be raised under Section 9(c) of the Labor-Management Relations Act, as amended, with respect to said employees.

8. On September 26, 1962, the Board instituted an action in the United States District Court for the District of Maryland, at Civil No. 14093, to enjoin the strike on the ground that Westinghouse was lawfully recognizing Plaintiff as the bargaining agent for certain maintenance employees in the Electronics Division, and that a collective bargaining agreement was in effect which covered those em-

ployees, and, therefore, "a question concerning the representation of such employees may not appropriately be raised under Section 9(c) of the Act." That court issued an injunction against the strike on September 26, 1962, finding, *inter alia*, that a question concerning the representation of such employees could not appropriately be raised under Section 9(c) of the Act.

9. Nevertheless, on October 9, 1962, Westinghouse filed with the National Labor Relations Board a Motion for Clarification of Bargaining Units, in which it requested "that the Board direct a hearing to fully explore the nature of this dispute," and to determine which certification, if any, was applicable to its plan to integrate into one new unit some employees from each of the existing units.

10. On January 29 and February 12, 1963, Local 1805 withdrew its prior claim to represent any maintenance employees in the Electronics Division. On February 13, 1963, the Regional Director of the Fifth Region of the Board, at Baltimore, Maryland, withdrew the then outstanding complaint based upon the Westinghouse unfair labor practices charge against Local 1805.

11. Notwithstanding the withdrawal by Local 1805 of its claim for recognition, Westinghouse filed a petition on February 14, 1963, with the board requesting that the Board direct an election in a unit of "all hourly paid maintenance employees including laborers and storeroom attendants assigned to or working out of the Defense Center Works Engineering Building, of the Employer, located at Friendship Airport, Baltimore, Md.," Case No. 5-RM-471. These employees were in the existing units of the Plaintiff and Local 1805.

No union then or thereafter requested recognition in the unit set forth in the petition, nor has the Board at any time so found. A copy of the petition is attached hereto and marked Exhibit 1.

12. Section 9(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. Sec. 159, provides, in part:

> "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes,

shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . ."

13. Section 9(c)(1)(B) of the Act, provides:

"Whenever a Petition shall have been filed in accordance with such Regulations as may be prescribed by the Board . . . by an Employer, *alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in Section 9(a)*, the Board shall investigate such petition and if there is reasonable cause to believe that a question of representation affecting commerce exists shall provide for appropriate hearing upon due notice." (Emphasis added).

14. The statutory requirement that an employer's petition raising a representation question must allege that an individual or labor organization has demanded recognition is incorporated in the Board's Rules and Regulations, Section 102.61(b), as follows:

"A petition for certification when filed by an employer shall contain the following . . .

"(3) A brief statement setting forth that one or more individuals or labor organizations have presented to the petitioner a claim to be recognized as the exclusive representative of all employees in the unit claimed to be appropriate . . ."

15. On April 4, 1963, plaintiff filed a "Motion to Dismiss Employer's Petition and Employer's Motion for Clarification of Bargaining Units." No response or disposition of this motion was made prior to the Board's Decision on these matters.

16. Notwithstanding the absence of an essential statutory requisite for entertaining an employer petition, the Board conducted a hearing on May 7, 1963, on the Westinghouse representation petition. No hearing was set on the Motion for Clarification.

17. At said hearing, Plaintiff and Local 1805 intervened for the limited purpose of expressing their opposition to the representation petition on the grounds that (a) the Act precluded the Board from entertaining a petition from an employer on whom no individual or labor organization has presented a claim for representation in the designated unit, and (b) the petition was premature because it was filed more than 90 days prior to expiration of either of the collective bargaining agreements which covered the employees in the proposed unit, and these agreements were threfore a bar to the proceedings. The Plaintiff and Local 1805 disclaimed any interest in the unit proposed by Westinghouse, and then withdrew from the hearing.

18. On September 9, 1963, defendants' issued their "Decision and Direction of Election and Order Partially Granting Motion for Clarification." Defendants consolidated the Motion for Clarification and the Petition for purposes of their decision. Defendants acted upon the Motion to Clarify for the purpose of revising the bargaining units of both the Plaintff and Local 1805 to eliminate the maintenance employees from both units, created a new unit of such maintenance employees, and then directed that an election take place in that unit. The Decision further provided that if a majority of the employees in the group vote for neither union they will remain unrepresented. A copy of the Board's Decision is attached hereto and marked Exhibit 2.

19. On September 25, 1963, Plaintiff and Local 1805 filed a Joint Motion for Reconsideration in which they requested that the Board reconsider its decision, and grant a hearing on the Motion for Clarification. The American Federation of Labor and Congress of Industrial Organiaztions joined in said Motion for Reconsideration as *amicus cariae*. On October 29, 1963, defendants denied the Motion for Reconsideration. A copy of the Order Denying Joint Motion for Reconsideration is marked Exhibit 3 and attached hereto. Although the issue of the denial of a hearing on the Motion for Clarification, *inter alia*, was not discussed in the Board's original Decision, reconsideration was summarily denied by defendants on the ground that "the con-

tentions therein have either been previously considered by the Board or do not warrant a further hearing." Thereafter, the Acting Regional Director of the Board's Fifth Region directed that an election be conducted on November 6, 1963.

20. Subsequently, on November 4, 1963, the Board postponed the election on the ground that renewed efforts were being made to settle the dispute, and the period of time set forth in the direction of election for holding the election was extended by the Board. The election is now scheduled to be held on December 20, 1963.

21. The decision of the defendants revealed that they treated the Westinghouse Motion for Clarification as a request for a redetermination and revision of existing bargaining units, and a new unit determination. In so doing, the Board severed from the unit represented by the Plaintiff a significant portion thereof for which it was certified and recognized. That portion, furthermore was covered by a collective bargaining agreement. By redetermining the units without a hearing, the defendants violated the Act and denied the Plaintiff due process.

22. Under Section 9(c) of the Act, the Board is required to provide a hearing in every case in which it has reasonable cause to believe that a question of representation affecting commerce exists unless the interested parties waive a hearing by stipulation. The manner in which the question is raised is immaterial. Section 9(c)(2) provides, in part:

> "In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of . . . the kind of relief sought . . ."

23. By reason of the wrongful acts and unlawful conduct of defendants complained of hereinabove, unless restrained by this Court, plaintiff will suffer grave and irreparable injury by reason of the impairment of its status as collective bargaining representative, and impairment of its contractual rights.

24. Plaintiffs have exhausted their administrative rem-

edies, and have no adequate remedy at law and no other means for the redress or wrongs whereof it here complains, except through mandatory injunction proceedings to review the action of the defendants.

WHEREFORE, plaintiff prays that this Court (a) issue a preliminary order enjoining and restraining defendants Frank W. McCulloch, Howard Jenkins, Boyd Leedom, John H. Fanning, and Gerald A. Brown, individually and as members of the National Labor Relations Board, their officers, agents and attorneys, employees and servants, including the Acting Regional Director of the Fifth Region, Eugene Curry, from conducting any election in *Westinghouse Electric Corporation*, Cases Nos. 5-RM-471, 5-RC-2920, and 5-RC-2143; (b) direct defendants to set aside the decisions therein pending further order herein; (c) upon final hearing in this matter, make any preliminary order of this Court permanent, and grant such other and further relief as this Court may deem appropriate.

/s/ BENJAMIN C. SIGAL,
DAVID S. DAVIDSON,
1126 16th Street, N. W.
Washington, D. C.
Attorneys for Plaintiff.

WINN I. NEWMAN,
Of Counsel.

Verification

DISTRICT OF COLUMBIA:

Benjamin C. Sigal, being duly sworn, deposes and says that he has read the foregoing Complaint, and that he believes the matters set forth therein to be true.

/s/ BENJAMIN C. SIGAL.

Subscribed and sworn to before me this 17 day of December, 1963.

JOSEPH R. ROARTY,
Notary Public, District of Columbia.

(SEAL)

My commission expires 4-30-1966.

EXHIBIT 1

COPY

UNITED STATES OF AMERICA, NATIONAL LABOR RELATIONS BOARD

Petition

Case No. 5-RM-471 Dated Filed 2/14/63

Instructions.—Submit an original and four (4) copies of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located.

If more space is required for any one item, attach additional sheets, numbering item accordingly.

The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority:

1. Purpose of this Petition *(Check only the one box which is appropriate)*

A. RC—CERTIFICATION OF REPRESENTATIVES (INDIVIDUAL, GROUP, LABOR ORGANIZATION).—A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner, and Petitioner desires to be certified as representative of the employees for purposes of collective bargaining, pursuant to section 9(a) and (c) of the act.*

B.XRM—REPRESENTATION (EMPLOYER).—One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner as defined in section 9(a) of the act.*

C. RD—DECERTIFICATION.—A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative as defined in section 9(a) of the act.*

D. UD—WITHDRAWAL OF UNION SHOP AUTHORITY.—Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded.

* Note.—If a charge under section 8(b)(7) of the act has been filed involving the Employer named herein, the statement following the description of the type of petition shall not be deemed made.

2. Name of Employer: Westinghouse Electric Corporation. Employer Representative to Contact: D. C. Lee. Phone No.: 761-1000.

3. Address(es) of Establishment(s) Involved (Street and number, city, zone, and State): P. O. Box 1693, Baltimore 3, Maryland.

4a. Type of Establishment (Factory, mine, wholesaler, etc.): Manufacturer.

4b. Identify Principal Product or Service: Defense Products.

5. Description of Unit Involved (If more space is needed, continue on another sheet):

Included: All hourly-paid maintenance employees including laborers and storeroom attendants assigned to or working out of the Defense Center Works Engineering Building of the employer, located at Friendship Airport, Baltimore, Maryland.

Excluded: All other employes, office clerical employes, technical and professional employes, guards and/or watchmen, and supervisors as defined in the Act.*

* (This group of employes to be added to either the existing Electronics Division production and maintenance unit of the existing Air Arm Division production and maintenance unit.)

6a. Number of Employees in Unit: 91.

6b. Is this Petition Supported by 30% or More of the Employees in the Unit? Yes No.

(If you have checked box RC in 1.A. above, check and complete EITHER item 7a or 7b, whichever is applicable).

7a. Request for recognition as Bargaining Representative was made on —— and Employer declined recognition on or about —— (If no reply received, so state).

7b. Petitioner is currently recognized as Bargaining Representative and desires certification under the act.

8. Recognized or Certified Bargaining Agent (If there is none, so state):

Name: International Brotherhood of Electrical Workers, Local 1805; International Union of Electrical Workers, Local 130.

Affiliation: AFL-CIO.

Address: 111 Cherry Hill Road, Baltimore 25, Md.; 2703 Wilkens Ave., Baltimore 23, Md.

Date of Recognition or Certification: 1952; 1958.

9. Date of Expiration of Current Contract, if Any (Show month, day, and year): October 31, 1963, October 15, 1963.

10. If You Have Checked Box UD in 1.D. Above, Show Here the Date of Execution of Agreement Granting Union Shop (Month, day, and year): ——

11a. Is There Now a Strike or Picketing at the Employer's Establishment(s) Involved? Yes —, No X.

11b. If So, Approximately How Many Employees Are Participating? ——

11c. The Employer Has Been Picketed by or on Behalf of ——, ——, a Labor Organization, of ——, —— Since ——.

12. Organization or Individuals Other Than Petitioner (and Other Than Those Named in Items 8 and 11c), Which Have Claimed Recognition as Representatives, and Other Organizations and Individuals Known to Have a Representative Interest in Any Employees in the Unit Described in Item 5 Above. (If None, so State): ——

I declare that I have read the above petition and that the statements therein are true to the best of my knowledge and belief.

Westinghouse Electric Corporation
By /s/ David L. Trezise, Attorney.

Address: Gateway Center, Pittsburgh 30, Penna. Express 1-2800.

EXHIBIT 2

Sep. 10, 1963.

144 NLRB No. 49 D-5647, Baltimore, Maryland.

UNITED STATES OF AMERICA, BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases Nos. 5-RM-471, 5-RC-2929, 5-RC-2143

WESTINGHOUSE ELECTRIC CORPORATION, *Employer-Petitioner,*

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1805, AFL-CIO,

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, LOCAL 130, AFL-CIO,[1] *Unions.*

DECISION AND DIRECTION OF ELECTION AND ORDER PARTIALLY GRANTING MOTION FOR CLARIFICATION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held in Case No. 5-RM-471 before August A. Denhard, Jr., hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Prior to the filing of said petition, the Employer had filed a Motion seeking clarification of the bargaining units heretofore certified in Cases Nos. 5-RC-2929 and 5-RC-2143.[2] In view of the relationship between the issues raised by the Motion and the petition, these matters are hereby consolidated for the purposes of this decision.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with these cases to a three-member panel.

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[1] The Unions are referred to herein respectively as IBEW Local 1805, and IUE Local 130. The name of the latter Union appears as corrected at the hearing.

[2] While the Employer's Motion also referred to Case No. 5-RC-1670, the unit certified in that proceeding is not involved herein.

Upon the entire record in these cases, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act.

2. The labor organizations involved herein claim to represent certain employees of the Employer.

3. Through the medium of its petition and motion, the Employer seeks a resolution by the Board of a dispute involving the representation of certain maintenance employees at its Defense Center operation at Friendship International Airport, Baltimore, Maryland. This operation is conducted in the following buildings: Air Arm, Electronics, Central Services, and Works Engineering and Maintenance; the last, herein referred to as the Maintenance Shop, is a recent addition. The employees in Air Arm receive, manufacture, assemble, test, and ship Air Arm equipment; those in Electronics perform the same functions for Electronics equipment; Central Services handles all administrative work; and the Maintenance Shop services all the buildings.

Prior to the construction of the Maintenance Shop, the maintenance facility for Air Arm was located in the Air Arm building, and that for Electronics in the Electronics building. Maintenance men in various trades, compensated equally for equal skills, were located in each facility, with about 39 in Air Arm and 26 in Electronics. While both groups were called upon for maintenance work in Central Services, there was no interchange between the groups. Duplicate supervisory hierarchies were maintained under the overall supervision of a works engineer, who at first was located in Air Arm and later in Central Services.

For a number of years, IBEW Local 1805 has been the certified and contractual bargaining representative of the approximately 2200 production and maintenance employees in Air Arm, and IUE Local 130 has similarly represented the approximately 1500 production and maintenance employees in Electronics. The most recent supplement to the IBEW contract, dated December 5, 1960, is effective until October 31, 1963; the term of the most recent supplement to the IUE contract is October 21, 1960, to October 15, 1963.

In the late summer of 1961, the Employer commenced

construction of the Maintenance Shop because the space then utilized by the maintenance facilities was needed for other purposes. The Employer contemplated the establishment of a common pool of maintenance employees and facilities and a single supervisory hierarchy so as to reduce inventories, eliminate the movement of work and materials between the two existing maintenance facilities, and facilitate a more efficient utilization of manpower, thus reducing the need for subcontracting. The Maintenance Shop was completed in June 1962, and on about July 2, maintenance equipment and employees from Air Arm and Electronics were moved there. The Unions were advised of the Employer's plans and objected thereto.

These objections took various forms, as did the Employer's countermeasures. Thus, about a week prior to the move, Air Arm maintenance men protested by a half-day work stoppage, which resulted in a 1-day disciplinary furlough. On July 2, IBEW Local 1805 filed a grievance, under its contract, claiming that the entire Maintenance Shop was an accretion to its unit. On August 9, the Employer refused arbitration on the ground that "all personnel are presently being treated as a part of the bargaining unit in which they have been working." On September 21, the Employer filed a petition in Case No. 5-RM-459, seeking an election among Maintenance Shop employees. That petition was subsequently withdrawn. On September 23, IBEW Local 1805 struck the entire Air Arm unit to protest the Employer's denial of arbitration of its accretion claim. The Employer filed charges in Cases No. 5-CC-203, 5-CP-22, and 5-CD-82, based on the strike. The General Counsel thereafter secured a temporary restraining order, ending the strike on September 26. At the October 4 hearing on the injunction, the Court directed that the proceeding be held in abeyance pending the filing of a "Motion for Clarification of Bargaining Units" so that the Board could resolve the problems raised. IBEW Local 1805 agreed at the hearing not to resume the strike in return for the Employer's agreement to drop the charges it had filed and to seek clarification of the units. The charges filed by the Employer were subsequently

withdrawn or dismissed. On October 9, the subject Motion was filed by the Employer. On October 17, IBEW Local 1805 filed its Answer to the Employer's Motion, requesting the Board to grant the Motion, and contending that the Maintenance Shop employees were an accretion to its unit. Both Unions brought charges under the AFL-CIO Internal Disputes Plan, and on January 29, 1963, subsequent to a decision thereon by the Impartial Umpire, IBEW Local 1805 withdrew the aforesaid Answer and the position taken therein. On March 7, 1963, IBEW Local 1805 notified the Board by letter that it disclaimed interest in those Maintenance Shop employees represented by IUE Local 130. On February 14, the Employer filed the instant petition.

Because of the Unions' resistance, and despite the consolidation of equipment and facilities, Maintenance Shop employees continue to work chiefly in the building to which they were formerly assigned, although both groups sometimes work together in Central Services and in the Maintenance Shop itself. The following additional changes have, however, been effected: (1) due to illness of the regular works engineer, there are temporarily two works engineers; (2) a night shift has been set up consisting for the most part of former Air Arm Maintenance people, all reporting to one supervisor; (3) the maintenance crew has been increased and now numbers about 92, of whom 55 are assigned to Air Arm work, and 37 to Electronics, with new employees assigned to one or the other; (4) about a week or two prior to the May 7, 1963, hearing herein, the Employer assigned two Electronics electricians to Air Arm work and an Air Arm painter to Electronics. Both Unions filed grievances based on these changes. IBEW Local 1805 also filed charges, in Case No. 5-CA-2436, which were subsequently dismissed.

The Employer asserts that because of the changes and projected changes in the organization of its maintenance functions, as outlined above, the maintenance employees are no longer appropriately part of two separate production and maintenance units, but rather constitute a single maintenance group. The Employer seeks by its Motion for

Clarification to remove these maintenance employees from the two certified production and maintenance units and, without an election, to add them as a single group to one of the two existing units. By its petition, the Employer, apparently in the alternative, seeks a self-determination election among the maintenance employees so as to determine the unit to which they should be added. The Unions moved jointly to dismiss the petition, claiming that there is no question concerning representation because their current contracts bar the petition and because neither one of them seeks to represent all of the maintenance employees. IUE Local 130 also moved to dismiss the Motion for Clarification on the ground, *inter alia*, that it is an improper substitute for a petition and a device to evade the Board's contract bar rules. IUE Local 130 also asserts that because both Unions have filed grievances protesting the Employer's actions, the issues herein should be settled through such grievance proceedings.

We find no merit in the Unions' contentions that these proceedings should be dismissed. It is evident from the recital above of the history of his dispute that the parties' efforts to date to reach agreement have met with failure. Further, the Employer and the District Court are looking to this Board to resolve the dispute; and, at least until the decision of the AFL-CIO Impartial Umpire, IBEW Local 1805 was also actively urging Board resolution. In these circumstances and without regard to any other considerations, we find no merit in the contentions of IUE Local 130 that the Board should not entertain the Motion for Clarification and should defer to the pending grievance proceedings. In addition, in the special circumstances of this case, including the foregoing and the fact that IBEW Local 1805 at one time claimed to represent all the maintenance employees, that the present claims of both Unions taken together encompass all such employees, and that dismissal of the petition would for the reasons indicated *infra* leave these employees without representation or opportunity to select representation, we find no merit in the contention that there is no question concerning representation because neither Union presently claims to

represent all such employees. Finally, as this decision is issuing after the 90th day preceding the termination date of each of the existing contracts between the Employer and the Unions, we find that these contracts are not a bar.[6] Accordingly, we find that a question affecting commerce exists concerning employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. We have discussed above the changes which have already been effected and those which are contemplated with regard to the maintenance employees, their equipment, and facilities. From these facts, it is evident that the Employer has sought to establish a single maintenance group to service all of its operations at the Friendship site; that it has made substantial progress in unifying the two maintenance groups into a single group; and that such separation as may presently exist results only from the parties' inability to resolve the current representation dispute. In these circumstances, we conclude that the maintenance employees in issue have effectively been merged into a single group and they may therefore no longer be considered as part of two separate production and maintenance units. There is further no warrant in the record for concluding that as a group they are more appropriately to be joined with the Air Arm employees than with the Electronics employees. In these circumstances, therefore, we shall grant the Employer's Motion to the extent of excluding these previously separate maintenance employees' groups from the existing production and maintenance units; shall deny it to the extent that it seeks to determine the representation of the maintenance employees without an election; and shall, in order to determine such representation, direct an election in the following voting group:

All maintenance employees at the Employer's Works Engineering and Maintenance Building, Friendship International Airport, Baltimore, Maryland, including laborers

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[6] See *Leonard Wholesale Meats, Inc.*, 136 NLRB 1000; *St. Louis Independent Packing Company*, 122 NLRB 887, 889.

and storeroom attendants, but excluding all other employees, office clerical employees, technical and professional employees, guards and/or watchmen, and supervisors as defined in the Act.

If a majority of the employees in the voting group vote for IBEW Local 1805, they will have indicated their desire to become part of the unit presently represented by that Union and IBEW Local 1805 may bargain for them as part of such unit. If a majority vote for IUE Local 130, they will be taken to have expressed their desire to become part of the unit presently represented by that Union, and IUE Local 130 may bargain for them as part of such unit. If a majority of the employees in the group vote for neither Union, they will be deemed to have expressed their desire to be unrepresented.

As noted above, we have directed an election in this voting group despite the fact that neither of the Unions presently claims to represent all the employees therein. In these circumstances, we shall permit either or both of the Unions to withdraw from the election upon written notice to the Regional Director within 10 days from the date of this Direction of Election. In the event that both Unions elect to withdraw, the Regional Director shall dismiss the petition and the employees in the voting group will remain unrepresented. The petition will, however, be reinstated if either or both of the Unions makes any claim to represent any of these employees within 6 months of the date of the dismissal.[7]

Order

It Is Hereby Ordered that the Certifications of Representatives heretofore issued in Case No. 5-RC-2143 on February 28, 1958, and in Case No. 5-RC-2929 on February 29, 1960, be amended specifically to exclude from the units described therein the classification of "maintenance employees," and that the Motion for Clarification filed in said cases otherwise be, and it hereby is, denied.

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[7] *Campos Dairy Products, Limited*, 107 NLRB 715.

Direction of Election

An election by secret ballot shall be conducted among the employees in the voting group described above, as early as possible, but not later than 30 days from the date below. The Regional Director for the Region where this proceeding was heard shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those in the voting group who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective-bargaining purposes by International Brotherhood of Electrical Workers, Local 1805, AFL-CIO; or by International Union of Electrical, Radio and Machine Workers, Local 130, AFL-CIO; or by neither.

Dated, Washington, D. C., September 9, 1963.

Frank W. McCulloch,
Chairman,

Boyd Leedom,
Member,

Gerald A. Brown,
Member.

National Labor Relations Board.

(SEAL)

EXHIBIT 3

October 30, 1963.
Baltimore, Maryland.

UNITED STATES OF AMERICA, BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases Nos. 5-RM-471, 5-RC-2929, 5-RC-2143

WESTINGHOUSE ELECTRIC CORPORATION, *Employer-Petitioner,*

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1805, AFL-CIO,

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, LOCAL 130, AFL-CIO,[1] *Unions.*

ORDER DENYING JOINT MOTION FOR RECONSIDERATION, AND CLARIFYING DECISION AND DIRECTION OF ELECTION AND ORDER

On September 9, 1963, the Board issued a Decision and Direction of Election and Order Partially Granting Motion for Clarification in the above-entitled consolidated proceeding,[1] in which it granted the Employer's motion for clarification to the extent of amending the Certifications of Representatives issued in Cases Nos. 5-RC-2143 and 5-RC-2929 to exclude maintenance employees from the units described therein; and, in Case No. 5-RM-471, directed an election in a voting group of all maintenance employees at the Employer's Works Engineering and Maintenance Building, Friendship International Airport, Baltimore, Maryland.

On September 25, 1963, International Brotherhood of Electrical Workers, Local 1805, AFL-CIO, and International Union of Electrical, Radio, and Machine Workers, Local 130, AFL-CIO, Intervenors in the consolidated

[1] 144 NLRB No. 49.

proceeding, filed a Joint Motion for Reconsideration,[2] in which they requested the Board to dismiss the Employer's motion for clarification and its petition or, alternatively, direct a hearing on the motion for clarification; they also requested oral argument. On September 27, 1963, the Employer filed a telegram opposing the Motion.

The Board, having duly considered the matter, decided (1) to deny the request for oral argument because the record, briefs, documents, and Motion for Reconsideration adequately present the issues and the positions of the parties; and (2) to deny the Motion for Reconsideration because the contentions therein have either been previously considered by the Board or do not warrant a further hearing. The Board also decided that, in order to avoid any possible misunderstanding, its aforesaid Decision should be amended to indicate clearly its intent that only these maintenance employees included in the voting group for which an election was directed are excluded thereby from the two certified units.[3] Accordingly,

IT IS HEREBY ORDERED that the Joint Motion for Reconsideration and request for oral argument filed herein be, and it hereby is, denied.

IT IS FURTHER ORDERED that the Decision and Direction of Election and Order Partially Granting Motion for Clarification issued herein be, and it hereby is, amended as follows:

(1) The description of the voting group in which the election was directed shall read:

> "All maintenance employees assigned to or working out of the Employer's Works Engineering and Maintenance Building, Friendship International Airport, Baltimore, Maryland, including laborers and storeroom attendants, but excluding all other employees, office clerical employees, technical and pro-

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[2] The AFL-CIO requested and was granted leave to file an amicus brief. On October 8, 1963, it filed a letter joining in the Joint Motion for Reconsideration.

[3] An inadvertent error in the Decision as to the date of Certification of Representatives in Case No. 5-RC-2929 is also corrected.

fessional employees, guards and/or watchmen, and supervisors as defined in the Act."

(2) The section entitled "Order" shall read:

"IT IS HEREBY ORDERED that the unit description in the Certification of Representatives heretofore issued in Case No. 5-RC-2143 on February 28, 1958, be, and it hereby is, amended to read: All production employees of the Employer in its Electronics Division at Friendship International Airport, Baltimore, Maryland, including group leaders, and shop clerical employees, but excluding all maintenance employees assigned to or working out of the Works Engineering and Maintenance Building, all salaried technical, office and office clerical employees, salaried time study clerks, clerical employees in the production planning department, guards, professional employees and supervisors as defined in the Act.

"IT IS FURTHER ORDERED that the unit description in the Certification of Representatives issued in Case No. 5-RC-2929 on August 17, 1960, be, and it hereby is, amended to read: All production employees at the Employer's Baltimore, Maryland, Air Arm Division, including salaried inspectors; but excluding all maintenance employees assigned to or working out of the Works Engineering and Maintenance Building, all other salaried employees, technical, professional, confidential and industrial relations employees, production expediters, expediter helpers, buyers, nurses, physicians, time study employees, guards and supervisors as defined in the Act."

Dated, Washington, D. C., October 29, 1963

By direction of the Board:

HOWARD W. KLEEB,
Associate Executive Secretary.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civ. Act. No. 3018-63

LOCAL 130, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *Plaintiff*,

v.

FRANK W. MCCULLOUGH, HOWARD JENKINS, BOYD LEEDOM, JOHN H. FANNING and GERALD A. BROWN, Individually and as Members of the NATIONAL LABOR RELATIONS BOARD, *Defendants.*

MOTION OF DEFENDANTS CHAIRMAN AND MEMBERS OF THE NATIONAL LABOR RELATIONS BOARD TO DISMISS THE COMPLAINT

1. Defendants move that the complaint herein be dismissed on the grounds that:

(a) This Court lacks jurisdiction over the subject matter of the action;

(b) The action is premature;

(c) The complaint fails to state a claim on which relief can be granted.

/s/ Marcel Mallet-Prevost
MARCEL MALLET-PREVOST,
Assistant General Counsel.
National Labor Relations Board

Dated at Washington, D.C., this 19th day of December, 1963.

"DEFS' EXH. 1"

COPY

BCC: Mr. J. A. Murray
BCC: Mr. W. A. Towle
BCC: Mr. D. L. Trezise

June 29, 1962.

Mr. John Buckley, President
Local 1805, IBEW—AFL-CIO
111 Cherry Hill Road
Baltimore 25, Maryland

Dear Mr. Buckley:

As your union has been advised over the last several months, we have constructed a new works engineering building in which it is planned that all maintenance operations presently performed at the Friendship Airport site will be combined. Starting on or about July 2, 1962, the employes involved will be assigned to this building from which they will be dispatched to the buildings at the Friendship Airport Site to perform the maintenance functions which have to be done.

In view of the fact that some of the employes involved are presently represented by Local 1805 of IBEW and some are represented by Local 130 of IUE, a problem arises as to the assignment of these employes.

Our present position is that the employes involved will continue to be treated as a part of the bargaining unit in which they have been working and will be assigned to perform work in the same manner as they have worked in the past.

We believe that the ultimate objective of consolidation of this activity into a single maintenance department for the Friendship Airport Site must be accomplished. However, we are willing to try an interim arrangement as outlined above, and after some experience is obtained, will notify you of any change in our position relative to assignment of this personnel.

Very truly yours,

/s/ D. C. Lee,
Manager, Industrial Relations.

"Defs' Exh. 2"

Excerpts from Stenographic Transcript of Hearing
In the Matter of

Westinghouse Electric Corporation,

and

International Brotherhood of Electrical Workers,
Local 1805, AFL-CIO,

and

International Union of Electrical, Radio and Machine
Workers, Local 130, AFL-CIO.

[Page 20, Line 23, Through Page 21, Line 13]:

Hearing Officer: Mr. Newman, do you have any comments?

Mr. Newman: Yes, sir. We fully accept the fact that IBEW does not claim to represent this unit described or any employees represented by IUE. As indicated by my previous remarks also, we have no interest in this proceeding since we do not plan to represent the employees. We have no interest on being on the ballot and we will not be on the ballot if an election is directed in this unit.

Therefore we also, not reflecting in any way upon the Hearing Officer or the Board, see no purpose to stay at the hearing.

We intervened, as we said earlier, for a very limited purpose and that limited purpose has now been served.

Hearing Officer: Is there anything further?

Mr. Dunn: No.

[Page 23, Line 18, Through Page 24, Line 6]:

Hearing Officer: Back on the record, please. Let the record reflect that at the request of two labor organizations present the Hearing Officer discussed with his superiors his previous ruling denying a motion for a recess for the labor organizations to appeal direct to the Board on the

motion to dismiss and he was informed that his ruling was proper in this case and motion is still denied.

Therefore, —all the parties present are familiar with our proceedings—we do intend to take such evidence as the company may have to present and if the other parties are not present, of course, they understand that any information that they have or maybe contrary to that furnished may go undeveloped.

EXHIBIT 3

UNITED STATES OF AMERICA, NATIONAL LABOR RELATIONS BOARD

Case No. 5-RM-471

WESTINGHOUSE ELECTRIC CORPORATION, *Employer-Petitioner,*

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1805, AFL-CIO,

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, LOCAL 130, AFL-CIO, *Unions.*

Date issued December 20, 1963. Type of election (check one): Consent Agreement, Stipulation, Board Direction, RD Direction, 8(b)(7).

TALLY OF BALLOTS

The undersigned agent of the Regional Director certifies that the results of the tabulation of ballots cast in the election held in the above case, and concluded on the date indicated above, were as follows:

1. Approximate number of eligible voters	97
2. Void ballots	one (1)
3. Votes cast for International Brotherhood of Electrical Workers, Local 1805, AFL-CIO	51
4. Votes cast for International Union of Electrical, Radio and Machine Workers, Local 180, AFL-CIO	30
5.	
6. Votes cast against participating labor organization(s)	4
7. Valid votes counted (sum of 3, 4, 5, and 6)	85
8. Challenged ballots	2
9. Valid votes counted plus challenged ballots (sum of 7 and 8)	87

10. Challenges are (not) sufficient in number to affect the results of the election.

11. A majority of the valid votes counted plus challenged ballots (Item 9) has been cast for: International Brotherhood of Electrical Workers, AFL-CIO.

For the Regional Director—Fifth Region:

/s/August A. Denhard, Jr.

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above. We also acknowledge service of this tally.

For International Brotherhood of Electrical Workers, Local 1805, AFL-CIO, /s/ Thomas B. Willey

For Westinghouse Electric Corporation, /s/ J. W. Holder

For International Union of Electrical, Radio and Machine Workers, Local 130, AFL-CIO,

/s/ Joseph J. Schmidt, Sr.

"Defs' Exh. 4"

Copy

Rec'd 12/27/63, NLRB, 5th Region

United States of America, Before the National Labor Relations Board, Fifth Region

Cases Nos.: 5-RM-471, 5-RC-2929, 5-RC-2143

Westinghouse Electric Corporation, *Employer-Petitioner,*

and

International Brotherhood of Electrical Workers, Local 1805,

and

International Union of Electrical, Radio and Machine Workers, AFL-CIO, Local 130, *Unions.*

Objections to Conduct of Election

International Union of Electrical, Radio and Machine Workers, Local 130, AFL-CIO, objects to the conduct of the election in Case No. 5-RM-471 for the following reasons:

1) The holding of an election in the above-captioned case was in derogation of the rights of both Unions to continue to represent the employees in the production and maintenance units for which they had previously been certified, and for which they held bargaining rights pursuant to existing collective bargaining agreements. The conduct of the election deprived the Unions of their rights without due process of law, as no hearing was ever held on the Motion for Clarification in Cases Nos. 5-RC-2143 and 2929.

2) The Board was without authority to direct any election pursuant to the petition of the employer in this case in view of the fact that neither Union claimed to be ex-

clusive representative of the employees in the unit found appropriate by the Board.

International Union of Electrical, Radio and Machine Workers, Local 130, AFL-CIO, therefore requests that the election conducted on December 20, 1963, be set aside, that the decision and direction of election be vacated, and that the order granting the Motion for Clarification be rescinded.

Respectfully submitted,

/s/ Benjamin C. Sigal,
Winn I. Newman,
David S. Davidson,
Attorneys for Local 130, International Union of Electrical, Radio and Machine Workers, AFL-CIO.

December 24, 1963.

"Defs' Exh. 5"

UNITED STATES OF AMERICA, BEFORE THE NATIONAL LABOR RELATIONS BOARD, FIFTH REGION

Cases Nos.: 5-RM-471, 5-RC-2929, 5-RC-2143

WESTINGHOUSE ELECTRIC CORPORATION, *Employer-Petitioner,*

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1805, AFL-CIO,

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, LOCAL 130, *Unions.*

REPORT ON OBJECTIONS

Pursuant to a Decision and Direction of Election and Order Partially Granting Motion for Clarification issued by the Board on September 9, 1963,[1] a secret-ballot election[2] was conducted under the supervision of the undersigned on December 20, 1963, with the following results:

Approximate number of eligible voters	97
Void ballots	one (1)
Votes cast for International Brotherhood of Electrical Workers, Local 1805, AFL-CIO	51
Votes cast for International Union of Electrical, Radio and Machine Workers, Local 130, AFL-CIO	30

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[1] As modified by Order Denying Joint Motion for Reconsideration, and Clarifying Decision and Direction of Election and Order dated October 29, 1963.

[2] The unit is: "All maintenance employees assigned to or working out of the Employer's Works Engineering and Maintenance Building, Friendship International Airport, Baltimore, Maryland, including laborers and storeroom attendants, but excluding all other employees, office clerical employees, technical and professional employees, guards and/or watchmen, and supervisors as defined in the Act."

Votes cast against participating labor organizations	4
Valid votes counted	85
Challenged ballots	2
Valid votes counted plus challenged ballots	87

The challenges are not sufficient in number to affect the results of the election.

Timely "Objections to Conduct of Election"[3] were filed by International Union of Electrical, Radio and Machine Workers, Local 130, AFL-CIO on December 27, 1963.

The Objections in full are as follows:

> "International Union of Electrical, Radio and Machine Workers, Local 130, AFL-CIO objects to the conduct of the election in Case No. 5-RM-471 for the following reasons:
>
> "1) The holding of an election in the above-captioned case was in derogation of the rights of both Unions to continue to represent the employees in the production and maintenance units for which they had previously been certified, and for which they held bargaining rights pursuant to existing collective bargaining agreements. The conduct of the election deprived the Unions of the rights without due process of law, as no hearing was ever held on the Motion for Clarification in Cases Nos. 5-RC-2143 and 2929.
>
> "2) The Board was without authority to direct any election pursuant to the petition of the employer in this case in view of the fact that neither Union claimed to be exclusive representative of the employees in the unit found appropriate by the Board.
>
> "International Union of Electrical, Radio and Machine Workers, Local 130, AFL-CIO, therefore requests that the election conducted on December 20, 1963, be set aside, that the decision and direction of

[3] The petition was filed on February 14, 1963. The undersigned will consider on its merits only that alleged interference which occurred during the critical period which begins on and includes the date of the filing of the petition and extends through the election. *Goodyear Tire and Rubber Company,* 138 NLRB 453.

election be vacated, and that the order granting the Motion for Clarification be rescinded."

In the interests of brevity the two labor organizations named in the caption will be referred to hereinafter by their initials "IBEW" and "IUE" respectively.

Objection No. 1 is a reiteration of the position taken by IUE and IBEW in their Joint Motion for Reconsideration filed with the Board in Washington, a copy of which was received by the Regional Office on September 26, 1963.

Objection No. 2 is a reiteration of the position taken by IUE and IBEW jointly at the hearing held on May 7, 1963 and in their previously mentioned Joint Motion for Reconsideration.

Both of the above positions were again reiterated by Mr. Joseph J. Schmidt, Sr., International Representative of IUE at the pre-election conference on December 20, 1963. IBEW did not join with IUE in arguing these positions on this last date. The IBEW has not filed objections to the election.

The Board has considered and disposed of the substance of these Objections[4] in its Order Denying Joint Motion for Reconsideration and Clarifying Decision and Direction of Election and Order dated October 29, 1963.

Accordingly the undersigned recommends that the Objections be overruled in their entirety.

Signed at Baltimore, Maryland this 7th day of January 1964.

JOHN A. PENELLO,
Regional Director
National Labor Relations Board,
Region Five
707 N. Calvert Street, Room 652
Baltimore, Maryland 21202

---

[4] The substance of Objection No. 2 was also raised in the hearing, in briefs and was considered and disposed of by the Board in its September 9, 1963 Decision and Direction of Election.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civ. Act. No. 3018-63

LOCAL 130, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *Plaintiff*,

v.

FRANK W. MCCULLOUGH, HOWARD JENKINS, BOYD LEEDOM, JOHN H. FANNING and GERALD A. BROWN, Individually and as Members of the NATIONAL LABOR RELATIONS BOARD, *Defendants*.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This case is before the Court on plaintiff's motion for a preliminary injunction restraining the defendant Chairman and Members of the National Labor Relations Board from conducting a representation election among certain employees of Westinghouse Electric Corporation (hereafter, the "Company"), and upon defendants' motion to dismiss the complaint. The Court, having considered the pleadings and memoranda which have been filed, and after oral argument by counsel for both sides in open court, makes the following findings of fact, conclusions of law, and order:

FINDINGS OF FACT

1. The Company operates a large industrial facility at Friendship International Airport, Baltimore, Maryland. The Company's Air Arm Division and Electronics Division are housed in separate buildings at this location.

2. For many years, Local 1805, International Brotherhood of Electrical Workers (hereafter "IBEW") has, pursuant to Board certifications, been the collective bargaining representative of the approximately 2,200 production and maintenance employees in the Air Arm Division. Similarly, plaintiff, Local 130, International Union of Electrical, Radio and Machine Workers (hereafter "IUE") has been certified by the Board as the collective

bargaining representative of approximately 1,500 production and maintenance employees in the Electronics Division.

3. Prior to July 1962, the Electronics Division and the Air Arm Division each operated separate maintenance departments located in their respective production buildings. Each maintenance department had its own separate tools and equipment, supervisory personnel, and employee lockers and storeroom facilities. Furthermore, the employees in each department were assigned exclusively to maintenance work located within their respective divisions.

4. In the summer of 1961, the Company, for reasons of economy, decided to integrate the two groups of maintenance employees, and began construction of a new Maintenance Shop to house the merged maintenance equipment and employee facilities. The Company also decided that all maintenance employees would, in the future, be assigned work without regard to whether the job involved was located in the Air Arm or the Electronic Division.

5. On July 2, 1962, the new Maintenance Shop was completed, and the maintenance equipment and employees from the Air Arm and Electronics Divisions were moved there. On the same day, IBEW filed a grievance under the contract grievance procedure, alleging that the new Maintenance Shop constituted an accretion to its existing unit, i.e. that all employees in the new Maintenance Shop were covered by the terms of the IBEW contract. Westinghouse refused to arbitrate this grievance.

6. On September 23, IBEW called the entire Air Arm out on strike in support of its claim that the employees in the new Maintenance Shop were covered by the IBEW contract, and in protest against the Company's refusal to arbitrate its claim. Thereupon, the Company filed unfair labor practice charges against IBEW, asserting that its action in calling a strike was violative of Section 8(b)(4) and (7) of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*). The Board's General Counsel issued a complaint based on these charges, and, pursuant to Section 10(l) of the Act, moved the United States District Court for the District of Maryland

for an injunction against the strike pending final Board disposition of the complaint.

7. On October 4, at the hearing before the District Court on the General Counsel's request for injunctive relief, IBEW agreed not to resume the strike (which had been temporarily restrained), and the Company agreed, in return to drop the unfair labor practice charges and seek resolution of the underlying dispute by requesting Board clarification of the units. Accordingly, the District Court directed that the injunction proceeding be held in abeyance pending the filing of a "Motion for Clarification of Bargaining Units" in order that the underlying dispute could be resolved by the Board.

8. On October 9, 1962, the Company filed with the Board a Motion for Clarification of Bargaining units contending that the outstanding IUE and IBEW certifications were no longer appropriate to the extent they required the separation of maintenance employees. The Company, in its motion, requested the Board to place all these employees, as a group, either in the IBEW or the IUE unit. IBEW filed an answer to this motion, reasserting its contention that the Maintenance Shop employees were on accretion to the IBEW unit and requesting that its certification and that of IUE be clarified to this effect.

9. Subsequently, Westinghouse also filed with the Board a petition for a representation election, asserting the existence of a conflict of representation claims as to the employees in the new Maintenance Shop and requesting that an election be held among those employees to resolve the conflict.

10. Meanwhile, on October 5, 1962, IUE invoked the AFL-CIO Internal Disputes Plan, filing charges against IBEW which alleged that the latter had violated the "no-raid" provisions of the AFL-CIO constitution. IBEW responded by filing countercharges, of similar import, against IUE. On December 27, 1962, David L. Cole, Impartial Umpire under the AFL-CIO Internal Disputes Plan, rendered a written determination in favor of the IUE. Thereupon, IBEW withdrew its answer to the Company's motion then pending before the Board, and

abandoned its "accretion" contentions. Subsequently, it notified the Board by letter that it disclaimed interest in representing the Maintenance Shop employees represented by IUE.

11. Meanwhile, because of the resistance of both IUE and IBEW, and despite the consolidation of equipment and facilities, Maintenance Shop employees continued to work chiefly in the building to which they were formerly assigned, although both groups sometimes worked together in Central Services and in the Maintenance Shop itself. The Company, however, set up a single night shift of maintenance employees, all of whom reported to a single supervisor. Furthermore, in May 1963, about a week prior to the hearing held by the Board in this case, the Company assigned two Electronics maintenance men to work in the Air Arm building, and an Air Arm man to work in the Electronics building. In response, both unions filed grievances protesting the assignments. IBEW also filed unfair labor practice charges with the Board, asserting that the assignments were violative of Section 8(a)(5) of the Act. These charges were subsequently dismissed.

12. On May 7, 1963, after notice to both unions, a hearing was conducted by the Board on the Company's petition for a representation election among the employees of the Maintenance Shop. Both unions appeared at the hearing but declined to participate fully therein. Instead, they each disclaimed interest in representing the maintenance employees previously represented by the other, moved to dismiss the petition, and, after the hearing officer denied their motion, refused to participate any further, stating that they had no interest in any election that might be directed and would not be on the ballot in any such election. After the unions withdrew from the hearing, the Company introduced evidence as to the changes in operations effectuated and contemplated by the Company.

13. On September 9, 1963, the Board issued a "Decision and Direction of Election and Order Partly Granting Motion for Clarification." Initially, in view of the relationship between the Company's motion seeking clarification of the bargaining units and its petition for an election to

resolve the conflicting representation claims, the Board consolidated the two matters. Next, the Board denied the unions' motions to dismiss, stating:

> We find no merit in the unions' contentions that these proceedings should be dismissed. It is evident from the recital above of the history of this dispute that the parties' efforts to date to reach agreement have met with failure. Further, the Employer and the District Court are looking to this Board to resolve the dispute; and, at least until the decision of the AFL-CIO Impartial Umpire, IBEW Local 1805 was also actively urging Board resolution. In these circumstances and without regard to any other considerations, we find no merit in the contentions of IUE Local 130 that the Board should not entertain the Motion for Clarification and should defer to the pending grievance proceedings. In addition, in the special circumstances of this case, including the foregoing and the fact that IBEW Local 1805 at one time claimed to represent all the maintenance employees, that the present claims of both unions taken together encompass all such employees, and that dismissal of the petition would for the reasons indicated *infra* leave these employees without representation or opportunity to select representation, we find no merit in the contention that there is no question concerning representation because neither union presently claims to represent all such employees.

14. Having disposed of the motion to dismiss, the Board then granted the motion for clarification to the extent of severing the new Maintenance Shop from the previously existing units. Furthermore, in response to the Company's petition, the Board directed that an election be held among the employees in the Maintenance Shop to determine their wishes with respect to union representation. In this connection, the Board stated:

> We have discussed above the changes which have already been effected and those which are contemplated with regard to the maintenance employees, their equip-

ment, and facilities. From these facts, it is evident that the Employer has sought to establish a single maintenance group to service all of its operations at the Friendship site; that it has made substantial progress in unifying the two maintenance groups into a single group; and that such separation as may presently exist results only from the parties' inability to resolve the current representation dispute. In these circumstances, we conclude that the maintenance employees in issue have effectively been merged into a single group and they may therefore no longer be considered as part of two separate production and maintenance units. There is further no warrant in the record for concluding that as a group they are more appropriately to be joined with the Air Arm employees than with the Electronics employees. In these circumstances, therefore, we shall grant the Employer's Motion to the extent of excluding these previously separate maintenance employees' groups from the existing production and maintenance units; shall deny it to the extent that it seeks to determine the representation of the maintenance employees without an election; and shall, in order to determine such representation, direct an election. . . .

* * * * *

As noted above, we have directed an election in this voting group despite the fact that neither of the unions presently claims to represent all the employees therein. In these circumstances, we shall permit either or both of the unions to withdraw from the election upon written notice to the Regional Director within 10 days from the date of this Direction of Election. In the event that both unions elect to withdraw, the Regional Director shall dismiss the petition and the employees in the voting group will remain unrepresented * * *

Subsequently, IUE and IBEW filed a joint motion for reconsideration, which was denied by the Board on the

grounds that "the contentions therein have either been previously considered by the Board or do not warrant a further hearing."

15. The election directed by the Board was scheduled for December 20, 1963, and, on December 18, 1963, IUE commenced the instant suit. On December 19, 1963, IUE's motion for a temporary restraining order against the conduct of the election was denied by Judge Holtzoff, and the election took place as scheduled. The results of the election were that, of 97 eligible voters, 51 voted for IBEW, 30 for IUE and 4 for no union. Subsequently, IUE filed objections to the conduct of the election, raising the same issues presented in the instant suit. On January 7, 1964, a report on objections was issued by the Regional Director of the Board's Fifth Region (who had supervised the conduct of the election), recommending that the objections be dismissed, and the matter is presently pending before the Board.

Conclusions of Law

1. There is nothing in the National Labor Relations Act which precludes the Board from conducting a representation election on an employer's petition filed under Section 9(c)(1)(B) of the Act where, as in the instant case, a union has made a claim to be recognized as the collective bargaining representative of employees and subsequently withdrawn that claim. Thus, it cannot be said that the Board's direction of election herein, despite IBEW's withdrawal of its demands for representation rights as to all maintenance employees, was "in excess of [the Board's] delegated powers and contrary to a specific prohibition in the Act" (*Leedom* v. *Kyne,* 358 U.S. 184, 188). To the contrary, it is the opinion of the Court that the Board's decision fall within the "wide area of determinations which depend on the Board's expertise and discretion" (*International Association of Tool Craftsmen* v. *Leedom,* 107 U.S. App. D.C. 268, 270, 276 F. 2d 514, 516, cert. denied 364 U.S. 815). See *Miami Newspaper Printing Pressmen's Union* v. *McCulloch,* — U.S. App. D.C. —, 322 F. 2d 993, 998, n. 11, in which the Court of Appeals stated,"Section 9(c)(1) does not use mandatory language in referring to

the initial action in representation proceedings. Whether a question of representation exists is within that area of expertise in which courts hesitate to interfere."

2. There is no substance to plaintiff's contention that the Board violated the Act and denied it due process of law by failing to hold a hearing on the Company's motion to clarify the IUE and IBEW certifications. Plaintiff concedes that a hearing was held on the Company's petition for a representation election, and that the Board subsequently consolidated the petition and the motion for purposes of decision. The issues in the two proceedings were essentially the same, i.e. the effect of the actual and projected changes in the Company's operations on the existing collective bargaining units. Having held one hearing to take evidence on this issue, the Board was not obliged to hold another merely because the unions had declined to participate in the first hearing.

3. Since the Board's decision does not contravene a mandatory direction of the Act or violate constitutional protections, this Court lacks jurisdiction over the subject matter of the action. *Milk & Ice Cream Drivers and Dairy Employees Union Local 98* v. *McCulloch*, 113 U.S. App. D.C. 156, 306 F. 2d 763 (C.A. D.C.); *Leedom* v. *IBEW*, 107 U.S. App. D.C. 357, 278 F. 2d 237; *International Association of Tool Craftsmen* v. *Leedom*, 107 U.S. App. D.C. 268, 276 F. 2d 514, cert. denied 364 U.S. 815; *National Biscuit Division* v. *Leedom*, 105 U.S. App. 117, 265 F. 2d 101, cert. denied, 359 U.S. 1011; see also *Leedom* v. *Kyne*, 101 U.S. App. D.C. 398, 249 F. 2d 490, aff'd 358 U.S. 184; *Miami Newspaper Printing Pressmen's Union Local 46* v. *McCulloch*, — U.S. App. D.C. —, 322 F. 2d 993.

ORDER

WHEREFORE, it is hereby ORDERED, ADJUDGED AND DECREED that:

1. Plaintiff's application for a preliminary injunction be, and hereby is, denied;
2. Defendants' motion to dismiss the complaint be, and hereby is, granted.

/s/ JOHN J. SIRICA,
Judge, United States District Court.

Dated: 2/26/64.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civ. Act. No. 3018-63

LOCAL 130, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *Plaintiff*,

v.

FRANK W. MCCULLOUGH, HOWARD JENKINS, BOYD LEEDOM, JOHN H. FANNING and GERALD A. BROWN, Individually and as Members of the NATIONAL LABOR RELATIONS BOARD, *Defendants*.

NOTICE OF APPEAL

Notice is hereby given that Local 130, International Union of Electrical, Radio and Machine Workers, AFL-CIO, plaintiff above named, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the order dismissing the complaint entered in this action on February 27, 1964.

BENJAMIN C. SIGAL,
DAVIL S. DAVIDSON,
Attorneys for Local 130, International Union of Electrical, Radio and Machine Workers, AFL-CIO.

BRIEF FOR APPELLEES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,650

LOCAL 130, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, APPELLANT

v.

FRANK W. MCCULLOCH, ET AL., MEMBERS OF THE NATIONAL LABOR RELATIONS BOARD, APPELLEES

On Appeal from an Order of the United States District Court for the District of Columbia

---

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Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

STEPHEN B. GOLDBERG,
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National Labor Relations Board.

STATEMENT OF QUESTIONS PRESENTED

1. Whether the District Court properly concluded that it lacked jurisdiction to review the Board's determination, in a representation proceeding under Section 9 of the Act, that a question of representation existed among certain employees and that an election should be directed to resolve that question.

2. Whether the District Court properly rejected appellant's claim that the Board had improperly granted a motion for clarification of appellant's certification without according appellant an opportunity to be heard thereon.

INDEX

AUTHORITIES CITED

Cases:

* Authorities chiefly relied upon.

Cases—Continued Page

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* Authorities chiefly relied upon.

Cases—Continued

Statute:

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,650

LOCAL 130, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, APPELLANT

v.

FRANK W. MCCULLOCH, ET AL., MEMBERS OF THE NATIONAL LABOR RELATIONS BOARD, APPELLEES

On Appeal from an Order of the United States District Court for the District of Columbia

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BRIEF FOR APPELLEES

JURISDICTIONAL STATEMENT

This case is before the Court upon an appeal from an order of the United States District Court for the District of Columbia granting appellees' motion to dismiss appellant's complaint. The complaint sought to restrain the Board from conducting an election among certain employees pursuant to Section 9 of the National Labor Relations Act, as amended (61 Stat.

136, 73 Stat. 519, 29 U.S.C. Secs. 151, *et seq.*). The jurisdiction of this Court is invoked under 28 U.S.C. 1291.

COUNTERSTATEMENT OF THE CASE

The undisputed facts, as set forth in the District Court's findings of fact, the complaint, and the exhibits, may be summarized as follows:

Westinghouse Electric Corporation ("Westinghouse") operates a large industrial facility at Friendship International Airport, Baltimore, Maryland. Westinghouse's Air Arm Division and Electronics Division are housed in separate buildings at this location. The Air Arm Division manufactures electronic equipment used in airplanes and other space vehicles; the Electronics Division manufactures electronic equipment for land and sea vehicles (J.A. 12, 33).[1]

For many years, Local 1805, International Brotherhood of Electrical Workers (hereafter "IBEW") has, pursuant to Board certifications, been the collective bargaining representative of the approximately 2200 production and maintenance employees in the Air Arm Division. During this time, IBEW has negotiated successive collective bargaining contracts on behalf of the Air Arm employees. Similarly, appellant, Local 130, International Union of Electrical, Radio and Machine Workers (hereafter "IUE") has been certified by the Board as the collective bargaining representative of approximately 1500 production and maintenance employees in the Electronics Division

[1] "J.A." references are to pages of the joint appendix herein.

and has also negotiated successive bargaining contracts (J.A. 2, 12, 33-34). Prior to July 1962, the Electronics Division and the Air Arm Division each operated separate maintenance departments located in their respective production buildings. Each maintenance department had its own separate tools and equipment, supervisory personnel, and employee lockers and storeroom facilities. Furthermore, the employees in each department were assigned exclusively to maintenance work located within their respective divisions. Both groups collectively provided maintenance services for the Central Services Building where Westinghouse's administrative offices are located. But, prior to 1962, no Air Arm maintenance employees were assigned to perform work at the Electronics building, and vice versa (J.A. 12, 34).

In the late summer of 1961, because the space occupied by the two maintenance facilities was needed for other purposes, Westinghouse began construction of a new Maintenance Shop. In conjunction therewith, Westinghouse decided to integrate the two separate maintenance groups into a single maintenance department. Thus, Westinghouse contemplated, inventories could be reduced, the wasteful movement of materials between two separate facilities could be eliminated, better supervision could be achieved, and more efficient utilization of existing manpower would be possible. (J.A. 12-13, 34.)

Both IUE and IBEW, on being notified of Westinghouse's plan to integrate the two maintenance groups, objected thereto. Furthermore, in late June 1962,

after the new Maintenance Shop had been completed, but before any employees had been transfered there, Air Arm maintenance men, represented by IBEW, staged a half-day work stoppage in protest against the transfer. (J.A. 13, 34.) Accordingly, in identical letters to the two unions, Westinghouse stated that it would continue to treat those employees transferred to the new Maintenance Shop as part of the bargaining unit in which they had been working, and would continue to assign them only to maintenance work in the division from which they had come, i.e., Maintenance Shop employees who had been transferred from Air Arm would be assigned exclusively to Air Arm maintenance work, and those transferred from Electronics Division would be assigned exclusively to Electronics Division maintenance work (J.A. 23). The letter continued:

> We believe that the ultimate objective of consolidation of this activity into a single maintenance department for the Friendship Airport site must be accomplished. However, we are willing to try an interim arrangement as outlined above, and after some experience is obtained, will notify you of any change in our position relative to assignment of this personnel.

On July 2, 1962, the new Maintenance Shop was completed, and the maintenance equipment and employees from the Air Arm and Electronics Divisions were moved there. On the same day, IBEW filed a grievance under the contract grievance procedure, alleging that the new Maintenance Shop constituted an accretion to its existing unit, i.e., that all employees

in the new Maintenance Shop were covered by the terms of the IBEW contract, including the compulsory union membership provision. Westinghouse refused to arbitrate this grievance on the grounds that although the maintenance employees had been physically moved, the existing separate bargaining unit lines were still being respected. In particular, all maintenance employees were still being assigned to jobs located only at their prior respective divisions. (J.A. 13, 34.)

On September 23, IBEW called the entire Air Arm out on strike in support of its claim that the employees in the new maintenance unit were covered by the IBEW contract, and in protest against Westinghouse's refusal to arbitrate its claim. Thereupon, Westinghouse filed unfair labor practice charges against IBEW, asserting that its action in calling a strike was violative of Section 8(b)(4) and (7) of the National Labor Relations Act. The Board's General Counsel issued a complaint based on these charges, and, pursuant to Section 10(l) of the Act, moved the United States District Court for the District of Maryland for an injunction against the strike pending final Board disposition of the complaint (J.A. 2-3, 13, 34-35).

On October 4, at the hearing before the District Court on the General Counsel's request for injunctive relief, IBEW agreed not to resume the strike (which had been temporarily restrained), and Westinghouse agreed, in return, to drop the unfair labor practice charges and seek resolution of the underlying dispute by requesting Board clarification of the units. Ac-

cordingly, the District Court directed that the injunction proceeding be held in abeyance pending the filing of a "Motion for Clarification of Bargaining Units" in order that the underlying dispute could be resolved by the Board (J.A. 13, 35). Westinghouse filed such a motion on October 9, 1962; IBEW filed a timely answer thereto with the Board, contending that the Maintenance Shop employees were an accretion to the IBEW unit and requesting that its certification and that of IUE be clarified to this effect (J.A. 3, 14, 35).

Subsequently, Westinghouse also filed with the Board a petition for a representation election, asserting the existence of a conflict of representation claims as to the employees in the new Maintenance Shop, and requesting that an election be held among those employees to resolve the conflict (*ibid.*).

Meanwhile, however, on October 5, 1962, IUE invoked the AFL-CIO Internal Disputes Plan, filing charges against IBEW which alleged that the latter had violated the "no-raid" provisions of the AFL-CIO constitution. IBEW responded by filing countercharges of similar import against IUE. On December 27, 1962, David L. Cole, Impartial Umpire under the AFL-CIO Internal Disputes Plan, rendered a written determination in favor of IUE. Thereupon, IBEW withdrew its answer to Westinghouse's motion then pending before the Board, and abandoned its "accretion" contentions. Subsequently, it notified the Board by letter that it disclaimed interest in representing the Maintenance Shop employees represented by IUE (J.A. 3, 14, 35).

Meanwhile, because of the resistance of both IUE and IBEW, and despite the consolidation of equipment and facilities, Maintenance Shop employees continued to work chiefly in the building to which they were formerly assigned, although both groups sometimes worked together in Central Services and in the Maintenance Shop itself. Westinghouse, however, set up a single night shift of maintenance employees, all of whom report to a single supervisor. Furthermore, in May 1963, about a week prior to the hearing held by the Board in this case, Westinghouse assigned two Electronics maintenance men to work in the Air Arm building, and an Air Arm man to work in the Electronics building. In response, both unions filed grievances protesting the assignments. IBEW also filed unfair labor practice charges with the Board, asserting that the assignments were violative of Section 8(a)(5) of the Act (J.A. 14, 36). These charges were subsequently dismissed.

On May 7, 1963, after notice to both unions, a hearing was conducted by the Board on Westinghouse's petition for a representation election among the employees of the Maintenance Shop. Both unions appeared at the hearing but declined to participate fully therein. Instead, they each disclaimed any interest in representing the maintenance employees already represented by the other. They also moved to dismiss the petition, contending that there were no conflicting representation claims before Westinghouse, and consequently no question concerning representation (J.A. 4, 5, 15). When the hearing officer denied the joint motion to dismiss the petition, IUE counsel stated (J.A. 24, 36):

> . . . we have no interest in this proceeding since we do not plan to represent the employees. We have no interest on being on the ballot and we will not be on the ballot if an election is directed in this unit.

Both unions then refused to participate further in the hearing despite the hearing officer's warning that:

> . . . we do intend to take such evidence as the company may have to present and if the other parties are not present, of course, they understand that any information they may have or may be contrary to that furnished may go undeveloped. (J.A. 25.)

On September 9, 1963, the Board issued a "Decision and Direction of Election and Order Partly Granting Motion for Clarification" (J.A. 5, 36). In view of the relationship between Westinghouse's motion seeking clarification of the bargaining units and its petition for an election to resolve the conflicting representation claims, the Board consolidated the two matters. Next, the Board denied the unions' motions to dismiss, stating (J.A. 15-16):

> We find no merit in the unions' contentions that these proceedings should be dismissed. It is evident from the recital above of the history of this dispute that the parties' efforts to date to reach agreement have met with failure. Further, the Employer and the District Court are looking to this Board to resolve the dispute; and, at least until the decision of the AFL-CIO Impartial Umpire, IBEW Local 1805 was also actively urging Board resolution. In these circumstances and without regard to any other consid-

> erations, we find no merit in the contentions of IUE Local 130 that the Board should not entertain the Motion for Clarification and should defer to the pending grievance proceedings. In addition, in the special circumstances of this case, including the foregoing and the fact that IBEW Local 1805 at one time claimed to represent all the maintenance employees, that the present claims of both unions taken together encompass all such employees, and that dismissal of the petition would for the reasons indicated *infra* leave these employees without representation or opportunity to select representation, we find no merit in the contention that there is no question concerning representation because neither union presently claims to represent all such employees.

Having disposed of the motion to dismiss, the Board then granted the motion for clarification to the extent of severing the new Maintenance Shop from the previously existing units. Furthermore, in response to Westinghouse's petition, the Board directed that an election be held among the employees in the Maintenance Shop to determine their wishes with respect to union representation. In this connection, the Board stated (J.A. 16-17):

> We have discussed above the changes which have already been effected and those which are contemplated with regard to the maintenance employees, their equipment, and facilities. From these facts, it is evident that the Employer has sought to establish a single maintenance group to service all of its operations at the Friendship site; that it has made substantial progress in unifying the two maintenance groups into a

single group; and that such separation as may presently exist results only from the parties' inability to resolve the current representation dispute. In these circumstances, we conclude that the maintenance employees in issue have effectively been merged into a single group and they may therefore no longer be considered as part of two separate production and maintenance units. There is further no warrant in the record for concluding that as a group they are more appropriately to be joined with the Air Arm employees than with the Electronics employees. In these circumstances, therefore, we shall grant the Employer's Motion to the extent of excluding these previously separate maintenance employees' groups from the existing production and maintenance units; shall deny it to the extent that it seeks to determine the representation of the maintenance employees without an election; and shall, in order to determine such representation, direct an election. . . .

* * * *

As noted above, we have directed an election in this voting group despite the fact that neither of the unions presently claims to represent all the employees therein. In these circumstances, we shall permit either or both of the unions to withdraw from the election upon written notice to the Regional Director within 10 days from the date of this Direction of Election. In the event that both unions elect to withdraw, the Regional Director shall dismiss the petition and the employees in the voting group will remain unrepresented. . . .

Subsequently, IUE and IBEW filed a joint motion for reconsideration, which was denied by the Board on the grounds that "the contentions therein have either been previously considered by the Board or do not warrant a further hearing" (J.A. 5-6, 20).

The election directed by the Board was scheduled for December 20, 1963, and, on December 18, 1963, IUE commenced the instant suit. On December 19, 1963, IUE's motion for a temporary restraining order against the conduct of the election was denied by the district court (Holtzoff, J.), and the election took place as scheduled. The results of the election were that of 97 eligible voters, 51 voted for IBEW, 30 for IUE, and 4 for no union (J.A. 26-27). Subsequently, IUE filed objections to the conduct of the election, raising the same issues presented in the instant suit (J.A. 28-29).[2] On January 7, 1964, a report on objections was issued by the Regional Director of the Board's Fifth Region (who had supervised the conduct of the election), recommending that the objections be dismissed (J.A. 30-32), and this recommendation was subsequently adopted by the Board.

On February 26, 1964, the district court (Sirica, J.) issued an order granting the Board's motion to dismiss the complaint on the ground that "this Court lacks jurisdiction over the subject matter of the action" (J.A. 40).

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[2] IBEW did not file objections to the election.

SUMMARY OF ARGUMENT

1. The District Court properly granted appellee's motion to dismiss the complaint because it lacked jurisdiction to review the Board's determination, in a representation proceeding under Section 9 of the Act, that a question of representation existed among Westinghouse's employees, and that an election should be directed to resolve that question. Under established principles, district court review is available only if a party can show that a Board determination contravened a mandatory requirement of the Act or infringed constitutional protections. Review is clearly barred with respect to determinations which require the exercise of administrative judgment or discretion. See cases cited at pp. 15-16, 20, *infra*. The Board's determination that a question of representation existed does not involve a "specific prohibition in the Act" (*Leedom* v. *Kyne*, 358 U.S. 184, 188), but rather falls within "the wide area of determinations which depend on the Board's expertise and discretion" (*International Association of Tool Craftsmen* v. *Leedom*, 107 U.S. App. D.C. 268, 270, 276 F. 2d 514, 516, cert. denied, 364 U.S. 815). Nor did the Board's action in this case infringe appellant's constitutional protections. Accordingly, the district court properly concluded that it was without jurisdiction.

2. In any event, the Board's direction of an election among the Maintenance Shop employees constituted a reasonable and proper exercise of its discretion. Initially, it is undenied that IBEW had presented Westinghouse with the "claim to be recognized"

which is the statutory prerequisite to an election conducted under Section 9(c)(1)(B) of the Act. While that claim was subsequently withdrawn, and while the Board will not generally conduct an election where all claims for recognition have been withdrawn, the special circumstances of this case warranted the Board's departure from its normal practice. In the first place, even after IBEW's disclaimer, each union continued to claim representation rights for a portion of the Maintenance Shop employees, and their combined claims encompassed the entire group. This alone suffices to raise a question of representation warranting Board action; since the change in Westinghouse's maintenance operations meant that the Maintenance Shop employees could no longer appropriately be allocated to two different bargaining units, the question was necessarily raised of which union, if any, should represent them. Furthermore, since the Maintenance Shop employees may no longer be represented by two separate unions as part of two separate units, dismissal of the petition would have left these employees without union representation or opportunity to select such representation. Finally, for the Board to have dismissed the petition would have left Westinghouse vulnerable to continued jurisdictional strife in its efforts to set up and operate a single Maintenance Shop, serving both the Air Arm and the Electronics Division. For, subsequent to the date of the AFL-CIO Umpire's award, when Westinghouse attempted to make work assignments in accord with its revised organizational structure, both unions filed grievances and unfair labor practice charges.

Continued disputes of this nature, precluding Westinghouse from effectuating the merger of its previously separated maintenance departments, were inevitable in the absence of an election to determine which union would represent *all* the Maintenance Shop employees.

3. There is no merit to appellant's claim that the Board denied it due process of law by granting Westinghouse's motion for clarification without according appellant an opportunity to be heard thereon. That the Board held a hearing on this case is undenied. And, while that hearing was formally directed on Westinghouse's petition for an election, rather than its motion for clarification, the issue posed by the petition and the motion was essentially the same, i.e., whether the changes in Westinghouse's operations rendered the old bargaining units inappropriate and required that new units be set up. By choosing not to introduce evidence on this issue, but to stake all on its argument that no election should be held because of the IBEW disclaimer, appellant thus ran the risk that the unit question would be decided—for all purposes—on a record lacking such evidence as it might have. And, having chosen this course, it is not now open to appellant to argue that it has been denied due process of law because the Board held it to its choice and declined to direct a second hearing. In brief, this is not a case in which the Board has refused to accord a hearing; it is rather a case in which a party claims to be aggrieved because it declined to participate in one hearing and the Board will not di-

rect another. No constitutional issue is raised by such a claim.

ARGUMENT

The District Court Properly Granted Appellees' Motion to Dismiss the Complaint

A. *Introduction: jurisdictional prerequisites*

Appellant, a labor organization allegedly aggrieved by a Board determination in a representation case, sought judicial intervention in the court below. Established principles—undisputed here by appellant—generally preclude such intervention: a federal district court lacks jurisdiction to review and set aside a Board decision in a representation case except where the determination complained of clearly transgresses a mandatory direction of the Act or violates constitutional protections. *Boire* v. *The Greyhound Corp.*, 376 U.S. 473; *Milk & Ice Cream Drivers and Dairy Employees Union, Local 98* v. *McCulloch*, 113 U.S. App. D.C. 156, 306 F. 2d 763; *Leedom* v. *I.B.E.W.*, 107 U.S. App. D.C. 357, 278 F. 2d 237; *Int'l Ass'n of Tool Craftsmen* v. *Leedom*, 107 U.S. App. D.C. 268, 276 F. 2d 514, cert. denied, 364 U.S. 815; *Leedom* v. *Norwich Printing Specialties, Local 494*, 107 U.S. App. D.C. 170, 275 F. 2d 628, cert. denied, 362 U.S. 969; *National Biscuit Division* v. *Leedom*, 105 U.S. App. D.C. 117, 265 F. 2d 101, cert. denied, 359 U.S. 1011. See also, *Leedom* v. *Kyne*, 101 U.S. App. D.C. 398, 249 F. 2d 490, aff'd 358 U.S. 184; *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10;[3] *Miami Newspaper*

[3] In *Sociedad*, the Supreme Court pointed out—as it subsequently emphasized in *Boire* v. *Greyhound, supra*—that *Lee-*

Printing Pressmen's Union, Local 46 v. *McCulloch*, 116 U.S. App. D.C. 243, 322 F. 2d 993. Conversely, the foregoing cases also establish that the district courts may not review representation matters "in the wide area of determinations which depend on the Board's expertise and discretion." *Tool Craftsmen, supra*, 107 U.S. App. D.C. 268, 276 F. 2d 516.

Appellant urges that district court jurisdiction existed herein upon two alleged grounds: (1) the Board violated Section 9(c)(1)(B) of the Act by directing an election in the absence of "a [union] claim to be recognized" and (2) the Board violated both the Act and constitutional requirements of due process by amending appellant's certification without holding a hearing. We show below that both of these contentions are, in light of the undisputed facts, wholly lacking in merit. Accordingly, the district court properly dismissed appellant's complaint for lack of jurisdiction.[4]

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dom v. *Kyne, supra*, created only a "limited exception" to the general rule precluding district court jurisdiction; judicial intervention was permitted in *Kyne* only because the Board's order was " 'in excess of the delegated powers and contrary to a specific prohibition in the Act' " 372 U.S. at 16. And, while district court jurisdiction was also upheld in *Sociedad*, the Supreme Court expressly premised this result upon the presence of urgent unresolved issues affecting international relations: "a uniquely compelling justification for prompt judicial resolution. . . ." *Boire*, 376 U.S. at 4.

[4] Appellant argues (Brief, pp. 17-18) that the mere *assertions* in its complaint that the Board had violated the Act and the Constitution were sufficient to vest the district court with jurisdiction. This we submit, is not the law. District court jurisdiction to review Board representation decisons does not

B. ***The Board's decision to direct an election among the employees of the Maintenance Shop did not violate any statutory mandate, but, to the contrary, was a reasonable and proper exercise of the Board's discretion***

1. *The Board violated no statutory mandate in directing the election*

Section 9(a) and 9(c)(1) of the Act, on which appellant relies, read, in relevant part:

> Section 9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:
>
> (c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—
>
> (B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

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stand or fall upon the artfulness with which the complaint is drafted, but rather upon whether the plaintiff can *show* the Board to have violated the Act or the Constitution. Thus, in nearly all the cases cited at pp. 15-16, *supra*, the plaintiff *alleged* that the Board had violated the Act and/or the Constitution. District court jurisdiction, however, was sustained only in those few cases in which that allegation was shown to be meritorious. Indeed, any other rule would, as a practical matter, result in a vast expansion of the presently narrow exception to the general rule that district courts are without jurisdiction to review Board representation determinations.

> the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. * * * If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

That the employer in this case did file a petition, in accordance with regulations prescribed by the Board, alleging that one or more labor organizations had presented to it a claim for recognition is unquestioned (see J.A. 8). Similarly, it is undisputed that the Board investigated the petition, held a hearing thereon, and, upon the record of that hearing, found the existence of a question of representation. Accordingly, the Board directed an election—the election which appellant seeks to set aside.

The gist of appellant's contention here is that the employer's allegation of demands for recognition was not supported by fact. Thus, appellant argues, the Board erred in finding the existence of a "question of representation" and in directing an election based upon that finding. We shall demonstrate below (see pp. 22-28, *infra*) that, in truth, there *was* ample factual support for the Board's finding that the employer faced recognitional claims which raised a question of representation. What warrants emphasis here, however, is that the Board's finding as to the existence of a question of representation, whether right or wrong, falls within "the wide area of determinations which depends on the Board's expertise and discretion." *Tool Craftsmen, supra*, 107 U.S. App. D.C. at

268, 276 F. 2d at 516. Accordingly, under settled law, it is not subject to district court review. See cases cited at pp. 15-16, *supra*.

In the recent case of *Miami Newspaper Printing Pressmen's Union, Local 46* v. *McCulloch*, 116 U.S. App. D.C. 243, 322 F. 2d 993, this Court found district court jurisdiction to exist in a suit to compel the Board to certify the results of an election previously conducted by it; nonetheless, the Court stated (*Id.* at 248, n. 11, 998, n. 11):

> This is not contrary to prior rulings of this Court denying jurisdiction to review Board orders in certification proceedings. See, e.g., *Milk & Ice Cream Drivers* v. *McCulloch*, 113 U.S. App. D.C. 156, 306 F. 2d 763 (1962); *Leedom* v. *IBEW*, 107 U.S. App. D.C. 357, 278 F. 2d 237 (1960); *International Ass'n of Tool Craftsmen* v. *Leedom*, 107 U.S. App. D.C. 268, 276 F. 2d 514, cert. denied 364 U.S. 815 (1960); *National Biscuit Div.* v. *Leedom*, 105 U.S. App. D.C. 117, 265 F. 2d 101, cert. denied, 359 U.S. 1011 (1959). These cases were concerned with challenges to Board action in the area of directing elections, and determination of the "appropriate unit." Section 9(c)(1) does not use mandatory language in referring to the initial action in certification proceedings. *Whether a question of representation exists is within that area of expertise in which courts hesitate to interfere.* (Emphasis supplied)

In *Milk & Ice Cream Drivers* v. *McCulloch*, and *Leedom* v. *IBEW*, both mentioned by the Court in the above quotation, the Board had found the existence of a question of representation and directed an election,

despite the existence of a collective bargaining contract covering the employees involved. A suit was brought in each case to enjoin the election, and in each the Board's discretion to determine the existence of a question concerning representation was held to preclude district court review jurisdiction. Similarly, in *National Biscuit Division* v. *Leedom*, the Board had found the existence of a question of representation, and directed an election because of a schism within the bargaining agent. In that case, the Court held that the district court's dismissal of a suit to enjoin the election was "clearly right" because "the Board's determination that the elections were warranted in the interest of stable bargaining relationships was within allowable limits of the Board's discretion." 105 U.S. App. D.C. at 119, 265 F. 2d at 103.

Furthermore, in cases in which, as here, a change in the nature of the employer's operations has led the Board to find the existence of a question of representation, the courts have recognized that this, too, is a discretionary matter which the district courts are without jurisdiction to review. *Consolidated Edison Co.* v. *McLeod*, 202 F. Supp. 351 (D.C. S.D. N.Y.), aff'd, 302 F. 2d 354; *Int'l Union of Operating Engineers Local No. 148* v. *Int'l Union of Operating Engineers Local No. 2, and N.L.R.B.*, 173 F. 2d 557, 559 (C.A. 8) (". . . the Board's action in calling for an election was by law committed to its discretion . . ."); cf. *N.L.R.B.* v. *Masters-Lake Success, Inc.*, 287 F. 2d 35 (C.A. 2); *N.L.R.B.* v. *J.W. Rex Co.*, 243 F.

2d 356, 359 (C.A. 3); *N.L.R.B.* v. *National Plastic Products Co.*, 175 F. 2d 755, 758 (C.A. 4).

Appellant would distinguish the instant case from those discussed above on the ground that what is challenged here is not only the propriety of the Board's ultimate finding that a question of representation existed, but also the preliminary finding that there was, as is required by Section 9(c)(1)(B) of the Act, "a [union] claim to be recognized as the representative" of the employees involved. It is, however, undisputed that there was a union claim to be recognized; IBEW claimed recognition rights as to all the maintenance shop employees from late June 1962 until February 14, 1963, when, pursuant to the decision of the Impartial Umpire under the AFL-CIO internal disputes procedure, it withdrew its claim as to those employees previously represented by IUE (retaining, however, its claim to recognition rights for all those employees previously attached to the Air Arm, numbering 55 out of the 92 in the new maintenance shop). Thus, what appellant's argument comes down to is this: where there has been a claim for recognition and that claim is subsequently withdrawn, the Board is statutorily precluded from directing an election. This contention was expressly rejected by the court below (J.A. 39) and, we submit, properly so. "There is nothing in the National Labor Relations Act which precludes the Board from conducting a representation election on an employer's petition filed under Section 9(c)(i)(B) of the Act, where, as in the instant case, a union has made a claim to be recognized and subsequently withdrawn that claim". To

the contrary, it is plain that the Act nowhere deals with the effect of a disclaimer. Thus, we submit, the effect of a disclaimer on the Board's power to find a "claim to be recognized" is committed to the Board's discretion to the same extent as the question of the effect of an unexpired collective bargaining contract on the Board's power to find a "question of representation." Neither question is subject to a mandatory statutory command; the Board's resolution of neither is subject to district court review.

2. *The Board's direction of election was a reasonable and proper exercise of the Board's discretion*

Prior to 1962, each of the two unions involved herein, IUE and IBEW, had, pursuant to Board certification, representation rights in a separate division of the Westinghouse facility at Friendship Airport. IBEW represented all maintenance employees in the Air Arm Division, and IUE represented all maintenance employees in the Electronics Division. While the employees in both groups performed similar work and possessed similar skills, their segregation into two units could be justified because each group functioned independently and in isolation of the other. There were separate lines of supervision, separate sets of tools and equipment, separate employee facilities, and—most important—separate jobsites. Air Arm maintenance employees were assigned only to jobs located at the Air Arm Division and Electronics maintenance employees were assigned only to jobs located at the Electronics Division.

In July 1962, however, Westinghouse, for reasons of economy and efficiency, altered its existing organizational structure, and merged the two previously separate groups of maintenance employees. The two groups are now located in the same shop, use one storeroom and one set of tools and equipment, and, to the extent union protests permit, are assigned to jobs at either the Air Arm or the Electronics Division without regard to their prior lines of separation.

Under these circumstances, the Board's decision to grant the employer's motion to clarify the unions' certifications by excluding the maintenance employees from the previously existing production and maintenance units, was eminently correct. For, as was stated by the Board (J.A. 16), ". . . the maintenance employees in issue have effectively been merged into a single group and they may therefore no longer be considered as part of two separate production and maintenance units." As to the Board's power to clarify a certification in a situation of this sort, see *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, 267-268.

Having decided, and properly so, that changed circumstances at the Westinghouse facility necessitated altering the existing units by removing the maintenance employees therefrom, the Board next found the existence of a question of representation among the maintenance employees, and, pursuant to Westinghouse's petition, directed that an election be held to resolve this question, i.e., to determine whether IUE or IBEW would represent the Maintenance Shop employees. In directing an election, the Board rejected

appellant's contention, raised again in these proceedings, that there was no question concerning representation because neither union claimed to represent all the employees in the Maintenance Shop. The Board, we submit, properly rejected this argument.

Appellant's argument—that each union's disclaimer of interest in representing any maintenance employees currently represented by the other union precludes the Board from finding the existence of a question of representation—is predicated on prior Board decisions in which union disclaimers resulted in the dismissal of employer representation petitions for lack of an existing representation question. The great majority of those cases [5] involved but a single union and are obviously distinguishable. The employer cannot show the existence of a question concerning representation rights when the only labor organization involved disavows any desire to represent employees in the appropriate unit.

Even in the case in which an employer's petition for an election is based on an allegation of conflicting claims for representation by two or more unions, all unions involved may disavow any claim to representation rights in a manner sufficient to satisfy the Board that no question of representation exists.[6] In

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[5] *Ny-Lint Tool*, 77 NLRB 642; *Miratti's, Inc.*, 132 NLRB 699, 701; *Amperex Electronics Corp.*, 109 NLRB 353; *Maclobe Lumber Company of Glen Cove*, 120 NLRB 320; *Librascope, Inc.*, 91 NLRB 178; *Luper Transportation Co.*, 92 NLRB 1178.

[6] See, e.g., *Southern Greyhound Line*, 141 NLRB 753.

the instant case, however, the Board declined to give such dispositive effect to the union's disclaimers and, we submit, properly so.

In the first place, all that the respective unions disclaimed in this case was an interest in representing the maintenance employees previously represented by the other union. Neither union disclaimed interest in that portion of the combined maintenance department which it had previously represented. Rather, each union has affirmatively sought to act as the exclusive bargaining agent of those maintenance employees previously represented by it—by filing grievances on their behalf, by filing unfair labor practice charges on their behalf, and by instituting strikes to support their demands with respect to the work assignments of these employees. Thus, even accepting the disclaimers at face value, each union has retained a current, undisclaimed interest in a portion of the maintenance employee group and the combined union claims encompass the entire group. This itself suffices to raise a question of representation warranting Board action: since the Maintenance Shop employees may no longer appropriately be allocated to *two* different bargaining units for representation, the question is necessarily raised of which union, if any, shall represent those employees.

Furthermore, since the Maintenance Shop employees may no longer appropriately be represented by two separate unions as part of two separate units, the dismissal of the election petition would have left those employees, as the Board noted (J.A. 15-16), without union representation or opportunity to select

such representation.[7] A due regard for the encouragement of collective bargaining militates against such a result especially where, as here, one union (IBEW) originally sought representation rights as to all the employees involved, withdrawing that claim only under the compulsion of the AFL-CIO Umpire's award.[8]

In addition, for the Board to have dismissed the petition on the basis of the AFL-CIO Umpire's award, and the Union disclaimers resulting therefrom, would have left Westinghouse vulnerable to

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[7] Appellant's assertion (Brief, p. 30) that those employees could have selected representation by a union other than IUE or IBEW would appear to be predicated on the erroneous notion that the Board found the Maintenance Shop to constitute, in and of itself, a unit appropriate for collective bargaining. This the Board did not do; rather it found that the Maintenance Shop employees could no longer be separated into two groups for bargaining purposes, but should be placed, as a single group, in either the IBEW (Air Arm) or IUE (Electronics) unit. Thus, if neither of those unions would represent the Maintenance Shop employees, or, in other words, take them into the Air Arm or Electronics unit, those employees, who could not be separately represented, would be without a Section 9 bargaining representative and without the opportunity to choose such a representative.

[8] Appellant does not, and can not, argue that the Board's direction of election in this case is invalid because of its conflict with the ruling of the AFL-CIO Umpire that each union should retain the representation rights it held prior to the creation of the new Maintenance Shop. The law is clear that the Board's authority over representation disputes takes precedence over the rulings of private arbitrators. *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261; *Doll & Toy Workers, et al.* v. *Metal Polishers, et al.*, 180 F. Supp. 280 (S.D. Calif.).

continued strife in its efforts to set up a single, integrated Maintenance Shop, serving both its Air Arm and Electronics Division. For, it is plain, whatever effect the AFL-CIO Umpire's award had on the inter-union dispute, it wholly failed to quiet the union-employer dispute. Thus, subsequent to the date of the AFL-CIO award, when Westinghouse attempted to make work assignments in accord with its revised organizational structure, both unions filed grievances and IBEW filed unfair labor practice charges. Continued disputes of this nature, precluding Westinghouse from effectuating the merger of its previously separated maintenance departments, were inevitable in the absence of an election to determine which union would represent *all* the Maintenance Shop employees.

In sum, in the circumstances of this case—IBEW's original claim to represent all employees in the Maintenance Shop, plus the fact that the claims of both unions, taken together, encompassed the entire Maintenance Shop—we submit that the Board properly found the existence of a question of representation and directed an election to resolve that question, despite IBEW's subsequent disclaimer. For, as we have shown, to have treated that disclaimer as conclusive would have left the employees involved without union representation and without the opportunity to choose such representation; it would, similarly, have left Westinghouse vulnerable to continued strife in its efforts to operate a single, integrated, Maintenance Shop. See *L. B. Spear & Co.*, 106 NLRB 687, 689

(". . . We believe that sound and stable labor relations will best be served by allowing the employees in the reconstituted unit to determine for themselves the labor organization which they now desire to represent them.")[9]

C. *Appellant's claim that it has been denied due process of law is wholly without merit*

Appellant also seeks to premise the district court's jurisdiction on the assertion that the Board has deprived it of due process of law by denying it a hearing on Westinghouse's motion to clarify the existing certifications. This assertion, as we shall show, is without merit.

Proceedings before the Board were initiated, as shown in the Statement, p. 6, *supra*, by two separate acts of Westinghouse. First, Westinghouse filed a motion for clarification, requesting that maintenance employees be excluded from the two production and maintenance units and added, as a single group,

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[9] Appellant argues that "if the Board were permitted to resurrect stale, withdrawn pre-petition claims to support employer petitions, then the specific intent of Congress to prevent an employer from obtaining an election when the union did not claim representation and was unprepared would be thwarted" (Brief, p. 29). Suffice it to say that such is not the instant case—here there is absolutely no factual basis for any inference that Westinghouse was using the petition as a device to frustrate union organization or upset campaign timetables. Furthermore, the Board gave the unions an opportunity to prevent the election, stating that if both withdraw, no election would be held. Both unions chose, however, to remain on the ballot, and having done so, can hardly claim that the election was forced upon them by the employer.

by order of the Board, to one of those existing units. Subsequently, by filing a representation petition, Westinghouse again sought to sever the maintenance employees, but this time requested that an election be conducted to determine to which unit the maintenance employees should be added.

On April 5, 1963, the Board directed a hearing on the representation petition. Both unions appeared at the hearing, which was held on May 7, 1963, but only to state their contention that no question of representation existed because neither of them claimed an interest in representing employees in the proposed unit. Neither union offered evidence to prove that the old bargaining units remained appropriate, nor that the proposed unit would be inappropriate; rather, they simply relied upon their own disclaimers of interest in the proposed unit to defeat the pending proceedings. Before the unions left the hearing, they were expressly warned by the hearing officer that Board findings would be made upon the record about to be developed regardless of the unions' absence.

In this context, appellant's assertion that it was denied a hearing is without substance. While the hearing was formally directed on Westinghouse's petition for an election, rather than its motion for clarification, the issue posed by the petition and the motion was essentially the same, i.e. whether the changes in Westinghouse's operations rendered the old bargaining units inappropriate and required that new units be set up. The only difference between the motion and the petition was in the relief sought: i.e., the motion sought to have the Board, by decision, place

all the maintenance employees in either the Air Arm or Electronics Division; the petition sought to give the affected employees a voice in their placement. Under both, however, the crucial preliminary question was whether the existing unit placement of the maintenance employees had been rendered inappropriate as a result of the setting up of the new Maintenance Shop. A hearing was held to take evidence on that question, but appellant declined to participate therein. Hence, this is not a case in which the Board has refused to accord a hearing; it is rather a case in which a party claims to be aggrieved because it voluntary declined to participate in a hearing. No constitutional issue is raised by such a claim.

Appellant contends, however, that there were *two* different unit issues, and that only one of them was before the Board in the hearing conducted upon the petition. In appellant's view, the petition raised the issue of whether the unit set forth therein was appropriate; while the motion for clarification raised the issue of whether the *existing* units were appropriate. Furthermore, appellant points out, a finding that the unit petitioned for was appropriate did not preclude a finding that the existing units remained appropriate.[10] Therefore, appellant concludes, it should have been able to refrain from participating in the hearing upon the petition without risking a finding that the existing units were no longer appropriate—a finding dispositive of the motion for clarification. This argument, however, is without merit.

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[10] See cases cited at p. 21 of Appellant's brief.

In the first place, while the motion for clarification raised the question of the continued appropriateness of the existing units, that question was also raised by the employer's petition for an election in a new unit. For, where one party seeks a change in existing bargaining units, and another party wishes to retain those units, the Board, in determining whether to hold an election, will consider not only the appropriateness of the unit sought, but also the continued appropriateness of the existing units. See, e.g., *The Housatonic Public Service Co.*, 111 NLRB 877; *Puerto Rico Steamship Ass'n.*, 116 NLRB 418; *Brooklyn Union Gas Co.*, 123 NLRB 441; *Kermac Nuclear Fuels Corp.*, 123 NLRB 462; *Moore-McCormack Lines*, 139 NLRB 796. In other words, while it is true that there were two different unit questions, both those questions—the appropriateness of the new unit and the continued appropriateness of the old—were before the Board on Westinghouse's petition for an election.[11]

Furthermore, while appellant argues that the Board could have found the unit petitioned for to be appropriate without finding the existing units inappropriate (since, in a particular factual situation there may be more than one appropriate unit), the possibility also existed that the Board would (as it

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[11] Indeed, to this extent appellant is correct in stating (Brief, p. 22, n. 7) that the Board need not have ruled on the motion for clarification; it could have directed, on the basis of the petition alone, that an election be held among the maintenance employees to determine which union was to represent them.

did) find that the charges in Westinghouse's operations were so substantial that the existing units were no longer appropriate and *only* the unit sought by Westinghouse was appropriate. See, e.g., *Brooklyn Union Gas Co.*, 123 NLRB 441. By staking all on the disclaimer issue, and declining to introduce evidence on the nature and effect, for bargaining unit purposes, of the changes, appellant thus ran the risk that the disclaimer question would be decided against it and that the changes in the Westinghouse maintenance operations, on which the appropriateness of both the new units and the existing units depended, would be decided on a record lacking such evidence as it might have. But, appellant chose to run this risk, and, having done so, it does not lie in its mouth at this time to argue that it should be given a second chance to introduce evidence which it does not contend was either newly discovered or otherwise unavailable at the time the hearing was held.[12]

In sum, we submit that the opportunity which appellant had to introduce evidence on the crucial issue in this case—the effect, for bargaining unit purposes, of the actual and proposed changes in Westinghouse's maintenance operations—was wholly adequate to satisfy the requirements of due process and the National Labor Relations Act.

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[12] It warrants mention, too, that even now appellant has failed to explain how, in view of the undisputed facts regarding the merger of maintenance employees, a continued separation of those employees for bargaining purposes could be contemplated or justified.

As the court below held (J.A. 40):

> Having held one hearing to take evidence on this [unit] issue, the Board was not obliged to hold another merely because the unions had declined to participate in the first hearing.

See also *N.L.R.B.* v. *Air Control Products, Inc.* F. 2d , 56 LRRM 2904, 2907, n. 25 and accompanying text (C.A. 5, July 28, 1964).

CONCLUSION

For the reasons stated, the judgment of the District Court should be affirmed.

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REPLY BRIEF FOR APPELLANT

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,650

LOCAL 130, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *Appellant*,

v.

FRANK W. McCULLOCH, ET AL, MEMBERS OF THE NATIONAL LABOR RELATIONS BOARD, *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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Table of Cases

ARGUMENT

This Reply is addressed to the more significant aspects of the Brief filed by the Appellee Board. While Appellant deems it unnecessary to respond to all the arguments made therein, failure to do so should not be taken as a concession of their validity or of the validity of restatements of Appellant's contentions made therein.

I. The Board Had No Authority to Direct an Election Pursuant to the Company's Petition

The Board concedes that before it may determine that a question concerning representation exists, it must first make "the preliminary finding, that there was as is required by Section 9(c)(1)(B) of the Act 'a [union] claim to be recognized as the representative' of the employees involved" (Bd. Br. 21). It also does not dispute that absent such a finding, the Board is without jurisdiction (Union Br. 26-27).

It asserts that here the statutory prerequisite was satisfied, because "IBEW claimed recognition rights as to all the maintenance shop employees from late June 1962, until *February 14, 1963*, when * * * it withdrew its claim as to those employees previously represented by IUE" (emphasis added, Bd. Br. 21), and because the claims of both unions together encompassed the entire maintenance shop, even after the IBEW claim for the entire shop was withdrawn (Bd. Br. 27). Neither of these reasons clothed the Board with power to act on the Company's petition.

As for the first, the Board misplaces the time of the IBEW withdrawal and ignores that its decision found that the withdrawal was unequivocal (J.A. 14-15). The Board places the date of the withdrawal of IBEW's claim as concurrent with the filing of the petition. The record,

however, establishes that IBEW withdrew its claim for recognition of all maintenance shop employees *prior* to the filing of the employer's petition. (Union Br. 5)[1] But the timing of the withdrawal is critical. Where a claim exists when a petition is filed, the Board has jurisdiction over the petition and discretion to determine what effect, if any, it would give to the withdrawal of the claim.[2] Here, absence of a claim at the time of the petition defeats the Board's jurisdiction and with it, its discretion. Furthermore, the Board made no finding that the withdrawal was equivocal. Rather, the Board attempted to rationalize the direction of an election despite the absence of the requisite claim. This it had no power to do.[3]

The Board's alternative justification for asserting jurisdiction over the Company's petition, as stated above, was that the claims of both unions encompassed all the maintenance shop employees. However, the fact that 2 or more labor organizations claim to represent complementary segments of a unit does not constitute a claim by any labor organization for recognition as representative of all the employees in that unit. Nor does it make a difference

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[1] The Board's Counterstatement of the Case does not dispute this fact as stated in Appellant's brief. Rather it would paper over it by omitting the dates from its recital of the facts and stating them out of chronological order (Bd. Br. 6). The Board's reference to February 14 as the date of IBEW's withdrawal of its claim appears for the first time in its argument and is unsupported by any citation (Bd. Br. 21).

[2] Even then, if the withdrawals are unequivocal, the Board declines to find the existence of a question concerning representation because it would be contrary to the policy of Section 9(c)(1)(B). See cases cited at Bd. Br. 24.

[3] Inferences that the conduct of the unions following the Board's Decision demonstrate that the withdrawal of the IBEW claim was equivocal are not only impermissible in this proceeding as beyond the scope of the matters before the Court on the motion to dismiss, but also would substitute new reasons for those on which the Board acted. *N.L.R.B.* v. *Capital Transit Company*, 95 U.S. App.D.C. 310, 313, 221 F. 2d 864, 867

that one of the segments includes a majority of the employees in the unit sought by the Company.

IBEW has been the exclusive representative of approximately 2200 production and maintenance employees and IUE has been the exclusive representative of approximately 1500 production and maintenance employees for several years. At the time the Company filed its petition, the only claim of each union was to continued representation of its existing unit. To be accurate, the claims of both unions together encompassed all production and maintenance employees at Air Arm and Electronics. If the Board's argument has any validity it would apply only to that unit.

But the Board's argument in any event is based on bad law and worse arithmetic. IBEW's authorization as the exclusive representative of the 2200 employees at the Air Arm Division may rest upon its designation by a bare majority of the 2200 employees. It cannot be inferred that because IBEW is the exclusive representative for 2200 employees, it is or claims to be majority representative of the small segment of those employees assigned to the maintenance shop. Nor indeed can it be inferred that because IBEW is the exclusive representative of all employees in Air Arm that it has been authorized to represent a single employee in the maintenance shop.[4] Indeed,

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(1955); *William Chae-Sik Lee v. Kennedy*, 111 U.S. App.D.C. 35, 294 F. 2d 231, 234 (1961), cert. den. 368 U.S. 926. That the disclaimer was equivocal was never decided by the Board. Moreover, the statements of both Unions of their intention to remain off the ballot were made when they had every reason to believe that a hearing would be held on the Motion to Clarify and no direction of election would be held absent a proper representational claim. All which followed the decision was a consequence of the improper revision of the existing units and direction of election. The Board cannot rely on acts pursuant to an unauthorized decision to supply the very authority it lacked.

[4] The after-the-fact election results are not conclusive as to the desires of these employees at the time the petition was filed or at the time the

even assuming *arguendo*, that at the time of the filing of the petition (or thereafter) IBEW represented a majority of the 39 employees in the maintenance shop who were assigned to work at Air Arm, a majority of 39 is obviously not necessarily a majority of 65, the total number of employees in the maintenance shop at or about the time the petition was filed (J.A. 12). Similar reasoning applies to the IUE claim to continued representation except that in view of the number of employees in the maintenance shop in its unit, it could not have claimed a majority of the employees in the shop. Thus, the claims of the two unions to continued representation in their existing units did not imply that either claimed to represent a majority of the employees in the maintenance shop.

But equally crucial is that whatever the number of employees who had authorized the two unions to represent them, the issue is not whether either union claimed to represent a numerical majority of the employees in the maintenance shop, but whether either made a claim within the meaning of Section 9(c), which requires that a claim be made by a labor organization or individual that it is the exclusive representative of the employees *in the* unit set forth in the petition. *Southern Greyhound Lines*, 141 NLRB 753, and *Housatonic Public Service Co.*, 111 NLRB 877, cited in the Union's main brief, p. 20, are directly in point. *Southern Greyhound* also involved a withdrawal of recognition claims, but, unlike here, the withdrawal occurred after the petition was filed. There, after giving effect to the withdrawals, the Board dismissed an employer petition despite claims of three unions which encompassed all employees in the unit named in the employer's petition because "no union claims to represent

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election was directed, nor do the election results indicate how the employees would have voted, if they had been given a choice of remaining in their respective units.

the employees in the unit which the employer maintains is appropriate". In *Housatonic Public Service* Company, 111 NLRB 877, a similar result was reached in a two union, two unit situation, where a broader claim had never been made. See Union Br. 30.

The Board does not answer this contention but seeks to distinguish *Southern Greyhound* by distorting the purpose for which it is cited and ignores *Housatonic* in this connection (Bd. Br. 24). In so doing, the Board's brief disregards the distinction in its decision between the original IBEW claim which was withdrawn and "the present claims" of both unions (J.A. 15).[5] Without foundation, it merges the complementary claim argument in its decision with the ineffective withdrawal argument in its brief. It makes no effort to come to grips with the effect of combined complementary claims, as relied on by the Board in its decision, and thus concedes that such claims cannot support the Company's petition. Confusion of issues may frequently make successful tactics but poor law.[6]

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[5] The Board Decision stated separately the facts "that IBEW Local 1805 at one time claimed to represent all the maintenance employees," and "that present claims of both Unions taken together encompass all such employees".

[6] The Board brief states "Appellant's argument—that each union's disclaimer of interest in representing any maintenance employees currently represented by the other union precludes the Board from finding the existence of a question of representation—is predicated on prior Board decisions in which union disclaimers resulted in the dismissal of employer representation petitions for lack of an existing representation question," p. 24. Nowhere will this argument be found in Appellant's brief. There is no question of disclaimer by IUE anywhere in this case. There are two separate questions involved. The first is whether the IBEW pre-petition withdrawal precluded reliance on its earlier claim. If so, then the question is reached whether complementary claims coextensive with each union's existing representation establish the claim required by statute, in the absence of any broader claim by either union.

The Board also utilizes this merger of arguments to answer the contention made with respect to the first step of the argument that the Board consistently honors disclaimers even when made as late as at a repre-

Thus, neither reason advanced by the Board satisfies the statutory prerequisite of a claim by a labor organization to be exclusive representative of the unit named in the employer's petition. There was no claim by IBEW to represent that unit when the petition was filed or at any time thereafter, and the combined claims of the two unions to represent their existing units cannot be arithmetically added.

Much of the Board's brief is devoted to the proposition that its action in directing an election was a reasonable and proper exercise of its discretion (Br. 22-28). But, the Board itself contends this is not the issue. If, as the Union contends, the Board may not entertain an employer's petition in the absence of a claim of exclusive representation in the unit named in the petition, then the only further question is whether the Board properly found a basis for its jurisdiction.

The cases cited by the Board to support its contention that the question here is merely one of discretion, are not in point (Br. 19-21). Most involved questions relating to the propriety of unit findings or contract bar determinations where no statutory standards were involved. Others alleged violation of statutory standards which were found in fact to have been observed. None held that the Board has discretion to act in disregard of statutory standards. See Union Br. 26. The effort to lump a number of cases together as holding the Board has discretion to act in merger cases purports to establish that changes in operations are a special province in which the Board is par-

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sentation hearing (Un. Br. 29). Its answer that "The great majority of these cases involved but a single union and are obviously distinguishable," is obviously irrelevant if the separation of the two steps of the argument is kept in focus. In short, the Board can only answer the critical arguments at pps. 29-30 of the Union Brief by distorting them beyond recognition.

ticularly unfettered to act. (Bd. Br. 20). This, of course, is without statutory foundation. The fact that these cases involved changes in operations gives them no special application here where the statutory basis for questioning the Board's actions is entirely different than in these cases. The failure of the Board to point to any other similarity concedes that they are makeweights.

While the question of propriety of an exercise of the Board's discretion is not here in issue, the adequacy of the reasons advanced by the Board to justify the Board's assertion of jurisdiction is in issue. Little effort has been made in the Board's brief to answer the argument that the reasons set forth in the Board's decision were inadequate to justify its assertion of jurisdiction, and indeed were irrelevant to it (Union Br. 27-31).

II. The Board's Action Amending the Certifications of Both Unions Violated Their Constitutional Rights and Was Unauthorized By the Statute

The Board does not dispute that Appellant was entitled to a hearing before entry of a final order depriving it of its representation rights and that no hearing was directed on the Employer's Motion to Clarify (Union Br. 6, 18-20). It contends, however, that the issues posed by the petition and the Motion to Clarify were "essentially" the same, and that the only difference was in the relief sought (Bd. Br. 29).

Without repeating arguments already made in our main brief, pp. 18-23, which we believe demonstrate the difference in the two proceedings, it is sufficient to note that the Board makes no attempt to justify its failure to call for a hearing on the Motion to Clarify, whether separate or consolidated, when the issues had been separately raised

by the employer.[7] None of the cases relied upon by the Board deals with such a situation.[8]

For the reasons set forth above, the relief requested in the Appellant's main brief should be granted.

Respectfully submitted,

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[7] The Employer's Motion to Clarify requested "that the Board direct a hearing" (Union Br., 4) and was pending at the time of the hearing on the petition. Appellant had filed a "Motion to Dismiss Employer's Petition and Employer's Motion for Clarification of Bargaining Units". (J.A. 4) As the Employer's Motion to Clarify requested a *hearing*, and as the Board issued a notice of hearing on the petition only, without acting on Appellant's Motion to Dismiss the Employer's Motion to Clarify, there was more than ordinary reason for the Unions to believe, and to rely upon the belief, that the issues raised by the petition were to be heard separately from those raised by the Motion to Clarify.

[8] The Board also suggests that Appellant's failure to explain how a continued separation of the maintenance shop employees could be justified indicates an inability to do so (Bd. Br. 32, n. 12). But if a party has been denied a hearing to which it is entitled, it is not necessary to allege or show prejudice. *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U.S. 292, 305-306; *Morgan* v. *United States*, 304 U.S. 1. Moreover, assuming that this is the only reason to deny the complaint, Appellant should be offered an opportunity to amend its complaint, to allege such prejudice, for Appellant filed an affidavit in the District Court setting forth facts which show that the denial of a hearing was prejudicial.